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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. 89

ROY WALKER, PETITIONER,

vs.

SOUTHERN RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 17, 1966
CERTIORARI GRANTED MAY 2, 1966

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[fol. A]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9967

ROY WALKER, Appellee,

vs.

SOUTHERN RAILWAY COMPANY, Appellant.

No. 9968

ROY WALKER, Appellant,

vs.

SOUTHERN RAILWAY COMPANY, Appellee.

Appendix to Brief for Appellant

[fol. 1] ROY WALKER, sworn:

Cross examination.

By Mr. Ward:

Q. What date did you go to work for the Railroad, Mr. Walker?

A. 1944.

• • • • • • •

ROY WALKER, sworn:

Direct examination.

By Mr. Hamrick:

Q. What did you see, if anything, when you walked into the call box at the Southern Railroad Office on May 29, 1957?

A. I saw a message on the Crew Clerk's Desk posted on where the crew book lies, you know, that said I had forfeited my seniority at midnight on May 28th.

• • • • • • •

Q. Now, I will direct your attention to the testimony of your daughter on March 7, 1957, state whether or not she made a telephone call for you?

A. Yes, sir.

Q. Where did she call, relative to the number?

A. She called Air Line Junction at Charlotte, North Carolina.

Q. What is at Air Line Junction, if you know?

A. You mean the telephone number?

Q. Yes, sir.

A. I don't remember.

Q. Air Line Junction, state whether or not that is a place of operations of the Southern Railway?

A. Yes, sir.

Q. Where does the Crew Clerk and the Call Clerk stay?
A. Right there in the yard office.
Q. And where is the yard office?
A. It's at Air Line Junction.
[fol. 2] Q. Did you hear what your daughter said to the person who answered the phone?
A. Yes, sir.
Q. What did she say?
A. She told them to mark me off sick, that I was not able to work.
Q. Later on Mr. Walker, did you have surgery?
A. Yes, sir.

* * * * * * *

Q. Mr. Walker, about May 11th, state whether or not you went to see Dr. T. R. Harris?
A. Yes, sir.
Q. State whether or not Dr. Harris wrote any letter at your request?
A. Yes, sir.
Q. To whom was that letter directed?
A. Edward R. Brinkley, Terminal Train Master, Air Line Junction, Charlotte, North Carolina.
Q. Did Dr. Harris give you the letter after he wrote it?
A. Yes, sir, he addressed it and I took it to the Post Office and mailed it.
Q. Why did you request him to write the letter?
A. Because I had been given a letter to protect my seniority within thirty (30) days or I would have forfeited it.
Q. Did you see the letter that Dr. Harris wrote?
A. Yes, sir.
Q. Did you read it?
A. Yes, sir.
Q. What did it say relative to your ability to work?
A. It said that I was unable to work.

* * * * * * *

[fol. 3] By Mr. Hamrick:

Q. Mr. Walker on April 9, 1957, state whether or not you saw E. R. Brinkley?

A. Yes, sir.

Q. Do you remember the exact date? Or is it some day thereabouts?

A. It was sometime about April 9th.

The Court: Of '57?

A. Yes, sir, that's right.

Q. Mr. Walker, do you know what Mr. Brinkley's position was with the Southern Railway at that time?

A. Terminal Train Master.

Q. Now, will you relate the conversation you had with Mr. Brinkley?

A. Well, when we went to the Trade Street Railroad Station on Trade Street in Charlotte, when I started in the station, Mr. Brinkley came out I spoke to him.

Q. What did you tell him?

A. He asked me where I had been and I told him I had been sick.

Q. What did he say.

A. Ah, Chief, you haven't been sick.

Q. What did you say?

A. I said, yes, sir, I have.

Q. What did you tell him had been the matter?

A. I told him I had had an operation.

Q. Now, then, what did you tell him about coming back to work if anything?

A. I did not tell him anything about coming back to work.

Q. What did he say to you about coming back to work?

A. He said, when I got able to come back to work to let him know.

[fol. 4]

DEFENDANT'S EXHIBIT NUMBER ONE

Letter from J. R. Brosnam to Roy Walker
dated April 29, 1957.

"Greenville, South Carolina
April 29, 1957
PR-1151

Mr. Roy Edmunt Walker,
Route 1,
Box 102
Forest City, N. C.

Dear Sir:

I understand you were displaced from a regular job at Air Line Junction, March 3, 1957 and have idled yourself since.

This is to advise you that you stand for work on your seniority and unless you protect your seniority standing within 30 days from the date of this letter, you will have forfeited your seniority.

Yours very truly,

Superintendent

Mr. Brinkley:

Please let me know if and when Fireman Walker reports.

J. R. B.

Copy:

Mr. E. C. Bradley, Local Chairman,
Brotherhood of Railroad Firemen,
306 West Earle Street,
Greenville, S. C."

[fol. 5] J. R. BROSNAM, sworn:

Direct examination.

By Mr. Ward:

Q. If you registered this letter or had a return receipt from him?

A. Yes, sir, this registered letter was registered under certificate 804699 and we received this receipt back at Greenville, and on the number one on the back side of this signed R. E. Walker and on line two it's signed Mrs. C. H. Walker.

Mr. Hamrick: I take it you are going to offer that?

A. The date is April 30, 1957.

Q. The date of the letter?

A. The date she signed her name to the receipt.

Q. The same date of the letter?

A. April 30, 1957.

DEFENDANT'S EXHIBIT No. Two

The Return Receipt

"Side one:

Post Office Department	Penalty for Private Use to avoid Payment of Postage $300 (GPO)
*RECEIVED NO. ————	Post Mark of *
CERTIFIED NO. 804699-PR-1151	Delivering Office
INSURED NO. ————	
	Name of Sender: Southern Railway Co.
RETURN TO	Street and No. or P. O. Box Superintendent's Office
	Post Office Greenville
POD Form 3811 Apr. 1955	State S. C.

[fol. 6] Side Two:

DELIVERING EMPLOYEE	☐ Deliver ONLY to addressee. ☐ Show address where delivered.

Received from the postmaster the registered, certified, or insured article, the number of which appears on the face of this return receipt.

1. R. E. Walker
   (Signature or name of addressee)
2. Mrs. C. W. Walker
   (Signature of addressee's agent—
   Agent should enter addressee's
   name on line ONE above)

DATE OF DELIVERY April 30, 1957

U. S. Government Printing Office: 1955 16-71548-1"

W. E. CURLEE, sworn:

Direct examination.

By Mr. Edwards:

Q. What time did you take over at the Charlotte Yard? What time of the month and date?

A. May 16th.

Q. Of what year?

A. 1957.

Q. What was your position?

A. Terminal Train Master.

Q. Of the Charlotte Yard?

A. Yes, sir.

Q. Was Mr. Roy Walker at the terminal of the yard as fireman at that time?

A. He was carried on the seniority list.

Q. He was on the seniority list at that time?

A. Yes, sir.

Q. When you were terminal train master at the Charlotte yard? Did Mr. Roy Walker come to see you in response to a letter he had received from Mr. J. R. Brosnam [fol. 7] with reference to the protection of his seniority, and if so, when?

A. On May 29th, approximately 2:00 or 2:30 p. m. of that evening.

Q. On May 29th at when?

A. Approximately 2:00 or 2:30.

Q. Who was with him?

A. The best I recall his daughter.

Q. Did you have a conversation with Mr. Walker on that day at that time?

A. Yes, sir.

Q. Will you give the Court the substance of that conversation as near as you remember it?

A. Mr. Roy Walker arrived at approximately 2:00 or 2:30 on May 29th and asked for Mr. Edward Brinkley, train master, I informed Mr. Walker that Mr. Brinkley had retired and that I was filling the term of train master position. And he said that he had come to mark up in lieu of the letter which he had received and he noticed a note on the crew book restricting him from marking up as of midnight May 28th.

Q. What did you tell him in response to that?

A. He told me that he had been sick; that he had been in the hospital.

J. R. Brosnam, sworn:

Direct examination.

By Mr. J. Nat Hamrick:

Q. When did the Call Clerk strike Mr. Walker's name from the list on that book?

A. When I notified him.

The Court: Is this what you call a union contract?

Mr. Hamrick: Yes, sir, I would like to particularly call attention to Article 25, subsection (e) 3, Page 38, and it reads as follows:

> "When hired engineers or firemen are laid off on account of reduction of service they will retain all seniority rights provided they return to actual service [fol. 8] within thirty days from the date their services are required."

By Mr. George Ward:

Mr. Ward: I offer this Exhibit No. 2, Defendant's Exhibit No. 2, receipt received into evidence.

A. No, sir, it is not the same date as the letter. The letter is dated April 29, 1957, and the receipt is signed by Mrs. Walker is April 30, 1957.

W. E. CURLEE, sworn:

Cross examination.

By Mr. J. Nat Hamrick:

Q. On the morning of May 29th there was a message saying that under no circumstances was Mr. Walker to be allowed to mark up because he had forfeited his seniority at twelve o'clock on the night of May 28th?
A. That's correct.

J. R. BROSNAM, sworn:

Cross examination.

By Mr. J. Nat Hamrick:

Q. Mr. Brosnam, I direct your attention to Page 27 of the deposition and ask you if in response to my question

which reads as follows: "Mr. Walker did report in for duty the day after you contend his seniority was taken, Didn't he" and I'll ask you if you didn't answer on Page 28, "That is my understanding", and if that is not your answer now?

A. That is correct.

ROY WALKER, sworn:

Direct examination.

By J. Nat Hamrick:

Q. Mr. Walker, what time on May 29, 1957, did you go to Air Line Junction, approximately?

[fol. 9] A. Well, the best of my recollection, it was somewhere around 2:00 in the afternoon.

W. E. CURLEE, sworn:

Cross examination.

By J. Nat Hamrick:

Q. On the morning of May 29th, there was a message saying that under no circumstances was Mr. Walker to be allowed to mark up because he had forfeited his seniority at twelve o'clock on the midnight of May 28th?

A. That is correct.

The Court: Mr. Brosnam, let me ask you this, in Exhibit No. 3 the words "Protect your seniority" appear; also in Exhibit No. 1 the words "unless you protect your seniority", what's meant by those words with respect to this case? I can imagine it may mean a whole lot of things, but with respect to this case would it have protected Mr. Walker's seniority if he had come in during this thirty day period or written and said "I'm sick in the hospital", and so on?

A. That is correct and he could have written me and answered my letter.

The Court: Is it fair to say that if he had gotten notice to you or, well say, Brinkley, wasn't Brinkley his crew chief or something?

A. Brinkley was the Terminal Trainmaster at Air Line Junction, Charlotte.

The Court: If he had written you or Brinkley that he was sick, unable to work, in the hospital, do you say that would have protected his seniority?

A. Your Honor, I'm the only one in the Charlotte Division that would be allowed to write that letter that you see there. Therefore he should have answered that letter back to me or phoned me.

The Court: I realize that, but I notice on Exhibit I you are asking Brinkley to "let me know if and when Fireman Walker reports."

A. That's true. What he could have done right there, he could have marked up for work at Air Line Junction. That was the reason I put that on the bottom.

[fol. 10] The Court: Just suppose—I'm being hypothetical on purpose, suppose he had written you. I know that he didn't, he does not even say that he did, but just suppose that he had written you during the period and said that he was sick and in the hospital, would that have extended the thing another thirty days or sixty days or six months, or what?

A. Well, he wouldn't have forfeited his seniority. I'll say that. Of course, what we would do in there, Your Honor, is the need the man for work, he stood for work, the junior man or the man immediately under him on the seniority roster was working so that showed—

The Court: But that doesn't answer my question. Suppose, in response to Defendant's Exhibit No. 1, Mr. Walker

had written you like you say he should have done and say, "I'm sick, I'm in the hospital, I can't work"?

A. That would have taken care of the situation.

Statement of Mr. Hardy, Counsel for the Defendant:

As I understood Mr. Brosnam's testimony, if a letter had been received from Mr. Walker by the right man saying he was sick and unable to report and would be unable to report for the period allowed him I understood Mr. Brosnam to say this would take care of the situation.

The Court: Do you agree with Mr. Brosnam's interpretation of it as counsel for the railroad.

Mr. Hardy: Yes, sir.

J. R. BROSNAM, sworn:

Direct examination.

By Mr. J. Nat Hamrick:

Q. Now, I continue to direct your attention to Page 28 of your adverse examination and ask you if you didn't make the following responses to the following questions which I asked you and if those aren't your answers now: Question on Line 11, "You have any reason to want to discharge him except he didn't report for seniority?" I'll ask you if your answer to that question was not: "No, sir, we needed him or he would never have given him the thirty day notifica-
[fol. 11] tion to return to duty". That was your answer, then and now?

A. That is right.

Q. All right, sir, on Line 15, question: "You had no other reason for wanting to discharge him at all?" I'll ask you if you didn't answer that, beginning with Line 7: "That's right. I don't know the man personally and I don't have any grudge against him. In other words I was carry-

ing out the provisions of the work agreement when I wrote the letter."

A. That's correct.

JAMES W. PORTER, sworn:

Direct examination.

By J. Nat Hamrick:

Q. What is your name, sir?

A. James W. Porter.

Q. Were you employed by the Southern Railway Company?

A. Yes, sir.

Q. In what capacity?

A. Yard Conductor, Yard master and Switchman.

Q. How many years did you work for the railroad?

A. About 23.

Q. When did you retire?

A. April 16, 1962—I believe it was '62. It's been 2 years this last April.

Q. In your service with the railroad did you have occasion to learn and understand the time as counted in letters the way the time is counted when a man is given 30 days to protect his seniority?

A. Yes, sir.

Q. The custom and usage of the railroad in counting the time you understand?

A. We kicked it around enough, the boys.

Q. In counting that time, state whether or not you count the date of the letter as one day in the thirty days?

A. No, sir.

[fol. 12] Q. You do not?

A. No, sir.

Q. State whether or not you count the date the man received the letter as one of the days of the thirty days?

A. No, sir.

Q. When do you begin counting the thirty days?

A. Thirty days after he receives the letter.

Q. And the first day you count is the day he receives the letter? Or the day after he receives the letter?

A. The day after he receives it. The day he receives it is not a whole day and he has thirty days.

J. R. Brosnam, sworn:

Cross examination.

By J. Nat Hamrick:

Q. Mr. Brosnam, you have your deposition before you, sir?

A. Yes, sir.

Q. Would you please turn to Page 25? I'll ask you if your responses to these questions were not the responses you made and if they are the responses now? I asked you a question on Line 24; "Now I'll get back to my original question, Mr. Brosnam, do you have anything in writing between you and the Brotherhood, which says that you are not to count the time from the day after the letter. Do you have anything in writing?" Your answer was: "I Do Not." Is that correct?

A. That's correct.

Q. Question: "Have you ever seen anything in writing?" Your answer is: "I have not." That's correct, isn't it?

A. That's correct.

Q. Question: "If there is such a writing, where would it be?" Answer: "The agreement apparently was made—I'll put it this way; I don't know where the writing, where the agreement would be. However, more likely it would be in Washington". That's correct, isn't it?

A. That's correct.

[fol. 13] Q. Question: "In what division in Washington"? Answer: "What we call the Labor Relations." That's correct, isn't it?

A. Correct.

Q. Question: "Who is in charge of that division?" Answer: "Mr. Lawson G. Tolleson." That's correct, isn't it?

A. That's correct.

Q. Question: "Lawson G. Tolleson?" Answer: "That's right."

A. Correct.

Q. Question: "Have you ever had the question come up before this case, about the time that's counted from the date you write the letter until you dismiss a man? And your Answer: "Never".

A. That's correct.

J. M. FORD, sworn:

Direct examination.

By Mr. Hardy:

Q. Who is Mr. L. G. Tolleson?

A. Mr. L. G. Tolleson is Assistant Vice-President in charge of Labor Relations of the Southern Railway System.

Q. On August 23, 1957, what was Mr. L. G. Tolleson's title?

A. Director of Labor Relations.

Q. Was he your immediate superior?

A. He was.

Q. Mr. Ford, when such a letter is written, how is the thirty-day period specified in that letter calculated?

Mr. Hamrick: Objection.

The Court: For Firemen?

Mr. Hardy: For Firemen. We are speaking of a letter written under this section of the Firemen's agreement.

The Court: Overruled.

A. Would you repeat the question, please?

Q. Would you read the question please?

(The court reporter reads the question on Line 9 above.)

[fol. 14] The Court: This is, of course, for firemen, not for some other kind of trainmen?

Mr. Hardy: That is correct, sir.

A. Calculated from the day the letter is written, meaning that the first day is the date of the letter.

Q. Is this the uniform and accepted practice in sending letters of this type, Mr. Ford, on Southern Railway Company lines?

A. It is.

Q. Has it ever, to your knowledge been questioned by the Brotherhood of Locomotive Firemen and Engineers who represent firemen on Southern Railway Lines?

Mr. Hamrick: Objection.

The Court: Overruled.

A. Not to my knowledge.

The Court: Have you ever had the question come up before this case where it is of critical importance?

A. Not in my time.

SOUTHERN RAILWAY SYSTEM

Accounting Department

Atlanta 3, Ga. September 26, 1963 weh/df
700-2

Mr. J. A. Chilton
Claim Agent
Southern Railway Company
Charlotte, N. C.

Dear Mr. Chilton:

Your telephone conversation with Mr. VanLandingham and letter confirming conversation on September 25, 1963 in regards to earnings for Roy Edward Walker, SS No. 241-22-4826, Route 1, Ellenboro, N. C. formerly employed by Southern Railway Co., as fireman on Charlotte Division.

Following is the gross earnings for Mr. Walker from 1944 through 1963.

[fol. 15]

Year	*Amount*	*Year*	*Amount*
1944	$1,079.73	1954	$1,040.88
1945	2,468.01	1955	2,291.60
1946	1,911.36	1956	3,321.74
1947	277.48	1957	790.65
1948	7.48	1958	.00
1949	.00	1959	.00
1950	551.24	1960	.00
1951	856.94	1961	.00
1952	2,803.69	1962	.00
1953	1,356.24	1963	.00

In order to get Mr. Walker's earnings from 1944 through 1958 broken down by pay periods it will be necessary for some one to get this information from the records at our warehouse in Macon, Ga.

Yours truly,

H. T. AMY,
Manager, Payroll Accounting.

PLAINTIFF'S EXHIBIT No. 2

Atlanta, Ga., November 10, 1964 H/K
700-2

Re: Roy Walker, SS No. 241-22-4826 vs. Southern
Re: Railway Company, United States District Court,
Re: Asheville, N. C.

Mr. L. G. Tolleson:

Your letter dated October 22, 1964, file LF-6-W-57 requesting certain information in connection with the above.

Listed below you will find, gross earnings by R. E. Walker for the years 1952 through 1957:

Year	*Gross Earnings*
1952	$2,803.69
1953	1,356.24
1954	1,041.88
1955	2,291.60
1956	3,321.74
1957	790.65

H. T. AMY,
Manager, Payroll Accounting.

[fol. 16]

PLAINTIFF'S EXHIBIT No. 1

SOUTHERN RAILWAY SYSTEM

Accounting Department

Atlanta, Ga., December 18, 1964 wsv/b
700-2

TO WHOM IT MAY CONCERN:

THE FOLLOWING IS A TRUE TRANSCRIPT OF EARNINGS, BY YEARS, FOR C. F. ROBINSON, SOCIAL SECURITY NUMBER 239-10-5218, ON FILE IN OFFICE OF MANAGER, PAYROLL ACCOUNTING, ATLANTA, GEORGIA.

Year	*Gross Earnings*
1964	$ 451.53
1963	7,826.69
1962	9,184.31
1961	6,849.44
1960	6,136.00
1959	5,744.68
1958	4,325.80
1957	5,553.84

H. T. AMY,
Manager, Payroll Accounting

SWORN to and subscribed before me
This 18th day of December, 1964.

RUTZ E. DUKES,
Notary Public, Georgia State at Large.
My Commission Expires Nov. 11, 1968.

[fol. 17]

JUDGMENT

Pursuant to memorandum of decision filed herein, It Is Ordered, Adjudged, and Decreed that the plaintiff have and recover of the defendant the sum of $4,500, and the costs of the action to be taxed by the Clerk.

This 16th day of January, 1965.

J. Braxton Craven, Jr., Chief Judge, United States District Court for the Western District of North Carolina.

A True Copy

Attest: Thos. E. Rhodes, By: J. E. Brantley, Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE DIVISION

Civil No. 2171

ROY A. WALKER, Plaintiff,

versus

SOUTHERN RAILWAY COMPANY, Defendant.

Heard December 21, 1964

Before Craven, Chief Judge.

Mr. George H. Ward, Asheville, North Carolina, and Mr. Thomas J. Edwards, Rutherfordton, North Carolina, for Defendant; J. Nathaniel Hamrick, Rutherfordton, North Carolina, for Plaintiff.

OPINION—January 18, 1965

This is an action by Roy Walker to recover damages for breach of his employment contract with the Southern Railway Company. Originally filed in the Rutherford County [fol. 18] Superior Court on August 15, 1963, it was removed on petition of Southern, by reason of diversity of citizenship, to this court.

Until his discharge as of 12:00 midnight, May 28, 1957,[1] Walker had been in Southern's employ approximately thirteen years, the latter portion of which he worked as a fireman.

On March 3, 1957, Walker was notified by a crew clerk for Southern that he had been "rolled for a regular job". In less colloquial language this means that Walker was displaced on his job by another fireman because of the latter's higher seniority. Walker then left, saying that he was sick and was going home.

By letter dated April 29, 1957, Walker was informed by J. R. Brosman, Southern's Division Superintendent, that unless he "protected" his seniority within 30 days from the date of the letter his seniority would be forfeited. A postal certificate shows that the letter was received and signed for by Walker's daughter-in-law on April 30, 1957. Walker was in the Gardner-Webb Medical Clinic recuperating from an operation, and did not actually see the letter until May 2, 1957.

As of midnight on May 28, 1957, Southern treated Walker's seniority as having been forfeited. The next day (May 29th) Walker appeared at the office of Southern in Charlotte seeking to protect his seniority, but was told that he had already lost it. Walker subsequently traveled to Greenville, South Carolina, to ask Mr. Brosman to reinstate him. Reinstatement was denied, whereupon this suit to recover damages for breach of contract was instituted.[2]

---

[1] Defendant has not pleaded any statute of limitations. Fed. R. Civ. P. (8).

[2] Walker originally sought reinstatement also. That part of the complaint has been dismissed.

Jurisdiction

If a discharged railroad employee elects to seek reinstatement (with or without back pay), the National Railroad Adjustment Board has primary jurisdiction to the exclusion of both state and federal courts. But if the em- [fol. 19] ployee accepts his discharge as final, and such is the situation here, he may bring an action at law for damages. *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950); *Moore* v. *Illinois Central R. R. Co.*, 312 U. S. 630, 61 S. Ct. 754, 85 L. Ed. 1089 (1941).

Walker did not exhaust administrative remedies available to him under the collective bargaining agreement between Southern and the Union. Southern not unreasonably contends that his failure to do so bars this action, and that exclusive jurisdiction is in the National Railway Adjustment Board. Whether he must show that he has exhausted his administrative remedies under the contract depends upon the applicable state law. *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U. S. 653, 73 S. Ct. 906, 97 L. Ed. 1325 (1953).

In *Haynes* v. *Winston-Salem Southbound Ry. Co.*, 252 N. C. 391, 113 S. E. (2d) 906 (1960), the North Carolina Supreme Court held that a railroad employee who accepts his discharge as final and brings an action to recover damages for breach of contract is not required to exhaust his administrative remedies before maintaining the action. Southern, in its brief, cites *Charlotte City Coach Lines, Inc.* v. *Brotherhood of Railroad Trainmen*, 254 N. C. 60, 118 S. E. (2d) 37 (1961), for the proposition that North Carolina law *does* require exhaustion of administrative remedies before maintaining an action for breach of contract.

The *Charlotte* case was decided after *Haynes*, but they are clearly distinguishable. *Charlotte* was a suit between an employer and a labor union; the court was primarily concerned with the interpretation of a North Carolina statute providing for *arbitration* of employee grievances. In that case the employee, over whom the dispute arose, was *sus-*

pended from his regular job as a passenger bus driver. He was not discharged.
[fol. 20]

Breach of Contract

Coming to the merits, Walker was discharged for one reason only: his alleged failure to "return to actual service" or report for work prior to the expiration of the 30-day limitation period.[3]

Walker informally notified Southern of his illness and inability to work by having his daughter telephone Southern's yard office in Charlotte on March 7, 1957. Again, on April 9, 1957, Walker, accompanied by his daughter and George Padgett, went to Southern's terminal station in Charlotte to pick up a salary check due him. While there, he told Edward Brinkley, Southern's "Trainmaster", that he was unable to work because of an operation and adhesions.

But, regardless of the effect, if any, of such informal notification, Walker contends that under no circumstances was Southern entitled to take his seniority away from him before the 29th of May, 1957, and the fact that it did so was a violation of his contract. Walker would count the 30-day period from the 29th of April to the 29th of May, *i.e.*, exclude the first day and include the last day.

Southern contends that the proper method of counting the 30-day period is to include the first day (the day the letter was written) and exclude the last day, thereby making the termination date fall on May 28, 1957.

The contractual provision setting forth the 30-day limitation period is silent as to how the period is to be counted.[4]

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[3] It was assumed at the trial, perhaps because of the employment contract, that the discharge was unlawful if Walker reported for work within 30 days of the notice. The trial proceeded on this premise.

[4] The provision appears in a handbook titled: *SCHEDULE OF WAGES and RULES AND REGULATIONS for Firemen, Hostlers and Outside Hostler Helpers.* Article 25(e)(3) provides: "When hired engineers or firemen are laid off on account of reduction in

According to Southern, it has not been interpreted in any judicial or administrative proceeding, nor has it been necessary to do so until now.

Southern officials who testified indicated that the customary practice of the railroad was to include the first and [fol. 21] exclude the last day, and that the Union was not opposed to such practice. But there was evidence to the contrary. Southern's contention is weakened by its admission that never before has time computation been of great importance. Common usage is not established.

Although there is no uniform rule of computing time with respect to the inclusion and exclusion of terminal days, the majority rule is that the time within which an act is to be done is to be computed by excluding the first day and including the last day. 86 C. J. S. 849, "Time" Section 13(1), (3), (7). North Carolina is in accord with this rule.[5] So is the federal practice. *In re Schmidt,* 54 F. Supp. 262 (D. C. Neb. 1944); See Fed. R. Civ. P. (6).

Walker reported for work on May 29, 1957. It is adjudged that this was the last day of the 30-day period within which he was required to report. Southern's forfeiture of his seniority as of May 28, 1957, was, therefore, unlawful and constituted a violation of his contract.

Under North Carolina law the measure of damages for wrongful discharge from employment is the actual damage sustained on account of the breach.[6] "The maximum amount

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service, they will retain all seniority rights; provided, they return to actual service within (30) days from the date their services are required."

[5] N. C. G. S. 1-593 provides: "The time within which an act is to be done, as provided by law, shall be computed by excluding the first and including the last day. If the last day is Saturday, Sunday or a legal holiday, it must be excluded."

[6] No evidence was offered at the trial bearing upon measure of damages. Sometimes employment contracts provide severance pay in event of discharge. Exhibit "D," has no such provision, nor does it even disclose the duration of the employment contract—itself a damage limitation. See: *Marranzano* v. *Riggs,* 213 F. (2d) 196 (D. C. Cir. 1954); *Enterprise Wheel & Car Corp.* v. *United Steelworkers of America,* 269 F. (2d) 327 (4th Cir. 1959).

recoverable is the difference, if any, between the agreed compensation and the amount the employee earned or by reasonable effort could earn during the contract period." *Thomas* v. *College,* 248 N. C. 609, 104 S. E. (2d) 175 (1958).

"Back pay" is a proper element of the measure of damages in actions for breach of contract of railroad employment. *Mackey* v. *Union Terminal Co.,* 321 F. (2d) 901 (5th Cir. 1963); *Air Line Dispatchers Association* v. *California Eastern Airways,* 127 F. Supp. 521 (D. C. Calif. 1954); *Cook* v. *Des Moines Union Ry. Co.,* 16 F. Supp. 810 (S. D. [fol. 22] Iowa 1936). But Walker has no contractual basis for claiming lost wages as damages *beyond* the date of this Judgment. *Shiels* v. *Baltimore & Ohio R. R. Co.,* 154 F. Supp. 917, 926 (S. D. Ind. 1957).

Moreover, Walker had the duty to mitigate damages, or, put more accurately, his damages are limited to the extent he could have reasonably mitigated them and failed to do so. That is, one injured by the breach will be allowed to recover from the other party only such damages as he could not with reasonable effort have avoided. *Troitino* v. *Goodman,* 225 N. C. 406, 35 S. E. (2d) 277 (1945).

When Walker was discharged in 1957, he was 52 years old and had been working for the railroad about thirteen years. The most he had ever earned was $3,321.74 in 1956. In 1955 he earned $2,291.60, in 1954 $1,040.88, in 1953 $1,356.24, in 1952 $2,803.69, in 1951 $856.94, and in 1950 $551.24. The years prior to that follow a similar income pattern.

It is not easy to seek new employment at the age of 52, but it is not impossible to do it successfully. No evidence was offered in the trial of this case tending to show that Walker made the effort. Walker's appearance and personality is pleasing. He does not appear to be sick, and no evidence was offered tending to show that he has been so ill as to be unable to work since 1957. In my judgment, Walker could have successfully sought other employment and have earned a minimum of approximately $50.00 a week, or $2,400.00 per annum. It is doubtful, in view of his work rec-

ord, that he would have earned substantially more than that amount had he been permitted to continue in his employment with Southern Railway. But the last year (1956) is much more significant than the prior ones. Considering the average income, but weighting the average heavily in favor of the last full years (1956), I draw the inference and find as a fact that but for his wrongful discharge Walker would have earned approximately $3,000.00 per annum as a fireman for the Southern Railway from date of discharge until now. It has not been more than seven and less than eight years since his discharge, and he has lost approximately $600.00 per year. I find that Walker has been dam- [fol. 23] aged in the amount of $4,500.00 by reason of wrongful termination of his employment.[7]

There is no evidence whatsoever to support the prayer for punitive damages, and the court fails and refuses to find that Walker is entitled to recover punitive damages.

It is adjudged that Walker has been damaged in the total sum of $4,500.00. Judgment will be entered that he have and recover of Southern that amount.

This 16th day of January, 1965.

J. Braxton Craven, Jr., Chief Judge, United States District Court for the Western District of North Carolina.

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[7] It is unnecessary to decide whether lost fringe benefits, *e.g.*, retirement and disability compensation, etc., should be considered as damage elements for the reason that no evidence was offered to show the value of same, even to show that such benefits were lost.

[fol. 24]

Appendix to Brief for Appellee

[fol. 25]

EXCERPTS FROM COLLECTIVE BARGAINING AGREEMENT BETWEEN SOUTHERN RAILWAY COMPANY AND BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

ARTICLE 25

ASSIGNMENTS

(a) REGULAR ASSIGNED MEN DOING EXTRA WORK, ETC.

(1) Passenger firemen will not be required to run freight trains, and will not be called to do extra passenger work except in cases of emergency.

(2) Firemen, passenger, freight, and yard, assigned to regular runs or service will be allowed to take their runs regardless of engine.

(3) Firemen running passenger trains one way and freight trains the other, will be considered as passenger men.

(b) EXTRA BOARDS

EXTRA PASSENGER BOARDS

(1) On divisions where passenger business will justify, there shall be an extra passenger list assigned. Such firemen will run first-in, first-out passenger service, except [fol. 26] that a fireman catching a regular run will hold such run until the regular fireman returns to work, except that he may claim another vacancy in passenger service. Firemen assigned to extra passenger service will hold rights over all other firemen in such service.

EXTRA HOSTLER BOARDS

(2) At points where hostler service will justify, there shall be an extra hostler list assigned. Such hostlers will

work first-in, first-out, in hostler service, except that a hostler catching a regular job will hold same until the regular hostler returns to work, except that he may claim another vacancy in hostler service.

(3) Hostlers assigned to extra service will hold rights over all other hostlers in such service.

(c) FIRST-IN FIRST-OUT

Freight firemen not assigned to regular runs or service, will be run first-in, first-out, in freight service, except as provided in Article 26, Section (c), paragraphs (1), (2) and (3).

(d) WORK TRAINS

(1) Regular firemen will not be called for work train service when extra men are available. In case extra men are not available, the youngest regular man will be called for this service.

This rule will not debar a regular fireman from claiming work train service when bulletined.

(2) When a work train has been in service for a period of six days, it will be considered a permanent vacancy and filled in accordance with the rules. (It is understood that under this rule no deadhead compensation will be allowed to either the men that take the positions or the men that are relieved from the positions.)

[fol. 27] (3) Work trains operated exclusively within yard limits at division terminals shall be manned by yard firemen, except that firemen regularly assigned to road work train service in accordance with the rules may be used in yard work train service for a period of three days or less; work train rates to apply.

(4) Work trains operated partly in yard limits at division terminals and partly on line of road (line of road

being outside of yard limits) shall be manned by road firemen; work train rates to apply.

(5) Work train rates to apply on any day combined switching and work train or wrecking service is performed.

NOTE: Understood and agreed that in the administration of this rule, if a crew is required to assist another crew in rerailing an engine or car when the derrick or tool car is not used, they will be paid work train rates provided thirty (30) minutes or more of their service is utilized in such rerailing; if derrick or tool car is used, work train rates will apply regardless of amount of time consumed.

NOTE: See letter dated August 7, 1928, on page 92.

NOTE: See memorandum of understanding on page 93.

(e) Reduction of Working Lists

(1) When, from any cause, it becomes necessary to reduce the number of engineers on the engineers' working lists on any seniority district, those taken off may, if they so elect, displace any fireman their junior on that seniority district under the following conditions:

(2) When reductions are made, they shall be in reverse order of seniority, except as provided in paragraph 8, Article 26 (e), when in effect. No reductions will be made so long as those in extra passenger service are averaging the equivalent of 4,000 miles per month; in pooled, chain gang or any other unassigned service paying freight rates are averaging the equivalent of 3,200 miles per month; [fol. 28] on the road extra list are averaging the equivalent of 2,600 miles per month; on the yard extra list are averaging the equivalent of 26 days per month.

(3) When hired engineers or firemen are laid off on account of reduction in service, they will retain all seniority rights; provided, they return to actual service within thirty (30) days from the date their services are required.

(4) Engineers or firemen taken off under this rule shall be returned to service as engineers or firemen in the order of their seniority and in their respective class of service, as soon as it can be shown that men in extra passenger service average the equivalent of 4,800 miles per month; in pooled, chain gang or any other unassigned service paying freight rates average the equivalent of 3,800 miles per month; in road extra service average the equivalent of 3,100 miles per month; in yard extra service average the equivalent of thirty-one (31) days per month.

Note—It is agreed that extra road men in freight service shall be required to stop off so that earnings or equivalent thereof will not exceed 3,800 miles per month. Yard extra men shall similarly be required to stop off so that earnings or equivalent thereof will not exceed 35 days per month.

(5) In returning engineers and firemen to service under paragraph 4 and the note thereunder, sufficient number of men will be added to the working list to keep the mileage between the maximum stipulated in paragraph 4 or the note thereunder, and the minimum stipulated in paragraph 2. If an additional assignment would reduce the mileage below the minimum stipulated in paragraph 2 for the same class of service, regulation will be made by requiring each man in the class of service affected to lay off when he has earned the equivalent of the maximum mileage stipulated in paragraph 4, or the note thereunder.

Note—Under the provisions of this paragraph (5) it is understood that if at a checking period it is found that [fol. 29] the mileage in a pool averages the equivalent of 3,800 miles per month and a man could not be added to the pool without reducing the av rage mileage below 3,200 miles per month, regulation will be effected in the following checking period by taking the individual man off when he has made the equivalent of 3,800 miles per month.

(6) After all engineers or firemen have been returned to service, the following regulations will apply with respect to further additions to the working lists:

In the regulation of extra passenger service, sufficient number of men will be assigned to keep the mileage or equivalent thereof within the limitations of 4,000 and 4,800 miles per month; in pooled, chain gang or any other unassigned service paying freight rates, 3,200 and 3,800 miles per month; in road extra service, 3,100 and 3,800 miles per month; in yard extra service, 31 and 35 days per month.

(7) When the mileage of men in either of the classes of service specified in paragraph 6 averages in excess of the maximum stipulated therein, and an additional assignment would reduce the mileage below 4,000 miles per month in extra passenger service; 3,200 miles per month in pooled, chain gang or any other unassigned service paying freight rates; 3,100 miles per month in road extra service; or 31 days per month in yard extra service, regulation will be made by requiring each man in the class of service affected to lay off when he has earned the equivalent of the maximum mileage stipulated in paragraph 6.

Note—Under the provisions of paragraph 6, it is understood that if at a checking period, it is found that the mileage in extra passenger service averages in excess of the equivalent of 4,800 miles per month; in pooled, chain gang or any other unassigned service paying freight rates averages in excess of the equivalent of 3,800 miles per month; in road extra service averages in excess of the [fol. 30] equivalent of 3,800 miles per month; in yard extra service averages in excess of the equivalent of 35 days per month, and if regulations cannot be made by assigning men without reducing the average below the minimum as set forth in paragraph 6, then regulations will be effected in the following checking period by taking the individual man or men off, so that earnings will not exceed the maximum for each class of service as set forth in paragraph 6.

(8) In the regulation of assigned passenger service, a sufficient number of men will be assigned to keep the mileage or equivalent thereof within the limitations of 4,000 and 4,800 miles per month; in assigned service paying freight rates, a sufficient number of men will be assigned to keep the mileage or equivalent thereof within the limitations of 3,200 and 3,800 miles per month. To keep within the mileage limitations set forth in this section, additional crews may be added or swing men used to relieve the regular men on specified days. If regulation cannot be made as provided herein, men will be required to lay off so that the equivalent of 4,800 miles in passenger, or 3,800 miles in the other assigned service, will not be exceeded.

(9) In assigned yard service, regulation will be made by requiring each regularly assigned man to lay off when he has earned the equivalent of 35 days per month.

(10) Maximum stipulated for freight service (3,800 miles) or the equivalent thereof, shall apply to Engineers and Firemen performing a combination of service.

(11) In regulating the working lists in the respective classes of service, each list will be handled separately, neither a minimum nor maximum being guaranteed.

(12) General committees will agree (among themselves) upon a stipulated period for checking and regulating the mileage each month; provided that the period must be 10, 15 or 30 days. Failing to mutually agree, the 15 day period applies. Arrangements to enable proper checking of the [fol. 31] mileage of engineers and firemen by committees will be made between the railroad officials and committees. All mileage records will be made available to either and/or both committees. When the mileage has been checked and the number of crews assigned in accordance with mileage limitations, there will be no further computations or adjustments made during the same period.

(13) There should be a uniform application of these mileage limitations for both engineers and firemen in the same class of service.

ARTICLE 32

REPRESENTATION AND ADJUSTMENT MATTERS

(a) REPRESENTATION

The right of any engineer, firemen, hostler or outside hostler helper to have the regularly constituted committee of his organization represent him in the handling of his grievances, under the recognized interpretation placed upon the schedule involved by the officials of the Company and the general committee making the same, is conceded.

(b) GRIEVANCES

(1) No grievance will be entertained unless presented in writing to the Superintendent within sixty day after its occurrence by the fireman, hostler, outside hostler helper or the committee of his choice. Firemen, hostlers, and outside hostler helpers shall have the right to appeal to the next ranking officer, provided such appeal be made in writing within sixty days after the Superintendent has rendered his decision to the fireman, hostler, outside hostler helper or the local committee representing him.

(2) The word "grievance" as used in paragraph next above refers to and covers all matters arising under schedule rules including, but not limited to, matters such as discipline and time claims. To be entertained must be pre- [fol. 32] sented in writing to Superintendent within sixty days after its occurrence, and, in event adjustment be requested which involves a money payment, the period covered by such adjustment cannot antedate a date sixty days prior to the date upon which such claim is filed.

(3) Claims involving time payments in other than discipline cases shall be deemed to have been filed when a time ticket is filed with the Superintendent or other proper officer to whom such time tickets are sent by employees involved. If declined by Superintendent, must be further handled or appealed in writing within sixty days. If not handled or so appealed within such sixty days, further handling is barred.

(4) Appeals, to be recognized under the statute of limitation rule, must be made in writing within sixty days from the date of final decision by any officer to whom an appeal has been made to the next ranking officer to whom appeal is to be made until such appeal reaches the highest ranking officer authorized to pass on such appeals. If not so appealed, further handling is barred.

(5) When erroneous over-payments are made, no retroactive adjustments will be made for a period of more than sixty days prior to the date such erroneous payments are discovered and employees notified that such adjustments are to be made.

NOTE: Section (b) effective August 1, 1944.

(c) COMMITTEES

Properly constituted committees of firemen or hostlers, desiring to present any matter to any proper official, will be granted leave of absence as soon as possible after application has been made.

(d) DISMISSAL FOR COMMITTEE WORK

No fireman or hostler will be dismissed from the service of the Company for serving on an adjustment Committee.

[fol. 33]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

J. R. BROSNAN, called by the plaintiff as an adverse witness, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hamrick:

Q. Mr. Brosnan, I'll ask you and let you refresh your recollection from looking at your deposition which is signed here, sir . . . do you have a copy of the deposition?

A. I do.

Q. I direct your attention to Page 11, Mr. Brosnan. In answer to my question at the deposition which reads as follows: "Mr. Brosnan, let me ask you this, is there a letter anywhere in the personnel file of Roy Walker from Dr. Harris directed to Mr. Edward Brinkley, telling Mr. Brinkley Mr. Walker was under his care and unable to work?" I'll ask you if your answer wasn't then and isn't now: "I am familiar with that but I will state this, that if he had a telephone that all he had to do between the time he received the letter, which was dated April 29, 1957, was to call the Call Office or to talk to Mr. Brinkley personally since he worked directly under Mr. Brinkley and so notify him." That was your answer then and I take it your answer now?

A. It is not, Mr. Hamrick, you read this wrong. You said, "I am familiar with that" and it says "I am not familiar with that".

Q. I beg your pardon, I did leave out "not." "I am not familiar with that". That's your answer?

A. That's right.

Court: Who is Brinkley?

Mr. Hamrick: He was Terminal Trainmaster at the time, is that right, Mr. Brosnan?

A. That's right. He's here, Your Honor.

Q. Mr. Brosnan, I'll direct your attention to Page 27 of the deposition and ask you that if in response to my question which reads as follows: "Mr. Walker did report in [fol. 34] for duty the day after you contend his seniority was taken, didn't he?", and I'll ask you if you didn't answer that on Page 28, "That is my understanding.", and if that is not your answer now?

A. That is correct.

Q. Now, I continue to direct your attention to Page 28 of your Adverse Examination and ask you if you didn't make the following responses to the following questions which I asked you and if those aren't your answers now; Question on Line 11: "You have any reason to want to discharge him except he didn't report for seniority?" I'll ask you if your answer to the question was not: "No, sir, we needed him or we would never have given him the thirty day notification to return to duty." That was your answer then and now?

A. That is right.

Q. All right, sir, on Line 15, question: "You had no other reason for wanting to discharge him at all?" I'll ask you if you didn't answer that, beginning with Line 7: "That's right. I don't know the man personally and he'll admit it. I don't know him personally and I don't have any grudge against him. In other words, I was carrying out the provisions of the work agreement when I wrote the letter."

A. That's correct.

Q. Question beginning on Line 22: "Now, Mr. Bosnan, when you wrote him the letter you needed him?" Answer: "Yes, sir." That's correct, isn't it?

A. That's right.

Q. Beginning on Line 25 of Page 28: "There's nothing in his personnel record that would show that you were wanting to discharge him for anything?" Your answer on Page 29: "I had no reason to discharge him other than carrying out the provisions of the working agreement." Did you answer it that way?

A. That's correct. However, right there I want to introduce this in here.

Mr. Hamrick: Objection.

Court: Objection overruled. Go ahead.

A. I want to introduce in here that he was not discharged from service.

[fol. 35] Q. He was not discharged from service.

A. That is correct. He forfeited his seniority on his own according to the working agreement.

Court: I didn't get your name correctly nor your title. Would you give it to me?

A. J. R. Brosnan, Superintendent.

Court: Superintendent of what?

A. What is known as the Charlotte Division.

Q. Mr. Brosnan, you did write him a letter on May 30, 1957, didn't you?

A. May I see the letter?

Q. I'll hand you the allegations in Southern Railroad's answer and you may refresh your recollection.

A. I want to see the letter, please.

Q. I don't think it's necessary to cross examine this witness about that. Mr. Brosnan, I direct your attention to Page 30 of your deposition, Line 14, and ask you if you didn't make the following responses to the following questions and if they are not your answers now. On Line 14 the question: "Mr. Brosnan, as far as you're concerned, except for being a day late you had no reason to discharge Mr. Walker?" Answer: "He failed to carry out the provisions of the working agreement described in my letter." That was your answer then and now?

A. Described in my letter to him.

Q. Question: "I understand that. I mean aside from that, Mr. Brosnan, aside from that did you have any other reason for wanting to discharge him?", and your answer was, "No, sir." That's correct, isn't it, sir?

A. That's correct.

Q. Question on Line 23: "You had no other reason for wanting to discharge him?" Answer: "As a matter of fact, we needed him for service to eliminate what we call doubling which costs the Southern Railway time and a half whenever a man doubles within 22½ hours." That was your answer, was it not, sir?

A. That's right.

Q. Mr. Brosnan, I direct your attention to Page 36 of your Adverse Examination, Line 18 . . . beginning Line [fol. 36] 15, and ask you if your answers to the questions weren't as I read them now. Question: "When a man is removed from your seniority list he is stricken from the list on that book, isn't he?" Your answer on Line 17: "That's right." That was your answer, is that correct?

A. That's correct.

Q. Line 18, question: "When did the Call Clerk strike Mr. Walker's name from the list on that book?" Your answer on Line 20: "When I notified him." That's correct, isn't it?

A. That's right.

Q. Line 21: "When did you notify him?" Your answer is: "May 29." That's correct, sir?

A. That's right.

Q. Question on Line 25, Page 36: "You notified the Call Clerk in Charlotte and these other few places on May 29 and on May 29 they struck his name from the seniority list?" Your answer: "That's right." That's correct, isn't it, sir?

A. That's right.

Mr. Hamrick: I believe that's all the questions I want to ask this witness on adverse examination, sir.

Court: All right.

Mr. Ward: If Your Honor please, to examine this witness at this time I'd have to go into many matters that I don't think would be germane until the plaintiff has gone on the stand.

Court: Then let him come down and you can put him up again.

Mr. Ward: All right.

Court: When this case started out it also sought reemployment for Walker. Is that part of the case now before the railroad adjustment board?

Mr. Hamrick: No, sir.

Court: Has it ever been before the railroad?

Mr. Hamrick: No, sir. We abandoned it in this court and it has never been before them.

Court: Do you have any more oral testimony?

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[fol. 37] Roy Walker, the plaintiff, having first been duly sworn, was examined and testified as follows:

Direct examination.

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Court: Whatever happened to the copy of the letter Dr. Harris made? Do you know anything about the copy?

Q. The copy that you took to Charlotte on the 29th, where is that copy?

A. I wrote a grievance to Mr. E. C. Bradley at 304 W. Arrow St. at Greenville and gave him that copy of that letter.

Q. Who wrote the grievance for you?

A. Mr. J. C. Adams.

Q. Did you mail that letter with the grievance in it?

A. I mailed it.

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Cross examination.

By Mr. Ward:

Q. What day did you go to work for the railroad, Mr. Walker?

A. 1944.

Q. Worked off and on up until March, 1957, didn't you?

A. Yes, sir.

Q. Now, as I understand you, on March 3, 1957, a fireman who was senior to you rolled you?

A. Right.

Q. And you went home then?

A. Yes, sir.

Q. You had been rolled before and you knew what that practice was?

A. Absolutely.

• • • • • • •

Q. All right. You didn't mark up on the extra board when you were rolled?

A. No, sir.

Q. You didn't notify any of your superior officers that you were going home or going to the hospital, did you? [fol. 38] A. The only man that I said it to was the Crew Clerk.

Q. Where was he?

A. He was sitting behind the desk.

Q. And you said you was sick anyhow and was going home?

A. I said, "I'm sick, I'm going home."

Q. And that's every word that was said, wasn't it? I'm sick and going home, that's all you said?

A. As well as I remember, yes, sir.

Q. Didn't tell him you was going to any hospital?

A. Well, I didn't know I was going to the hospital at that time.

Q. You did work every day and expected to come back in a day or two, didn't you or did you?

A. I expected to place myself on the extra board, yes, sir.

Q. Expected what?

A. I expected to go on the extra board, yes, sir.

Q. Well, you didn't mark up on it?

A. No, sir, I was sick.

Q. You expected to go on the extra board?

A. Yes, sir.

Q. Well, now, what effort on your part, what did you do to mark up on the extra board?

A. Well, you just go in and tell the Clerk to mark you up on the extra board.

Q. And you didn't do that, did you?

A. No, sir.

Q. Well, you never wrote your Trainmaster . . . you're immediately under the Trainmaster, were you?

A. Yes, sir.

Q. You never wrote the Trainmaster when you got home about being sick, did you?

A. No, sir.

• • • • • • •

Q. And you got a letter from the railroad to report to work on what date?

A. No answer heard.

Q. To protect your seniority.

A. It was postmarked the 29th day of April and said within thirty days.

Q. You got it the same date, didn't you?

A. No, sir.

Q. Who is Mrs. C. H. Walker?

A. My daughter-in-law.

Q. It was signed for on April 30?

A. Yes, sir.

[fol. 39] Court: When do you say you got it, what day, if you did? When did you get that letter?

A. I was in the hospital when my daughter-in-law signed for it.

Court: I say, when did you first see it?

A. I saw it about the 3rd day of May.

Q. You got it the next day after your daughter did, didn't you?

A. No, sir.

Q. Didn't you tell me that when I took your deposition?

A. No, sir, I did not tell you that.

Q. You got it, though, on the 3rd?
A. No, sir.
Q. What date did you get it?
A. I got it about the 3rd or 4th day of May.

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J. R. Brosnan, having previously been examined by the plaintiff as an adverse witness, and having been sworn, resumes the stand as a witness for the defendant, was examined and testified as follows:

Direct examination.

By Mr. Ward:

Q. Mr. Brosnan, I believe you were on the stand this morning.
A. That's correct.
Q. Stated you were Superintendent of the Southern Railway Company back in March, 1957.
A. That's correct.
Q. Offices at that time at Greenville.
A. Still is at Greenville.
Q. Now, you were asked this morning, Mr. Brosnan, about writing the letter of April 29 to the plaintiff, Mr. Walker. Is that a copy of the letter that you wrote him?
A. Yes, sir.
Q. I believe you showed on the face of the letter that you sent a copy of it to E. C. Bradley, Local Chairman of the Brotherhood.
A. That's correct.
Q. Was that mailed to Mr. Bradley?
A. Yes, sir.
[fol. 40] Q. I wish you'd say whether or not you got a receipt showing that letter had been received. Did you register it?
A. Yes, sir.

Mr. Hamrick: The receipt would be the best evidence. I'd like to have it in evidence and I would like to see it myself. I got a copy I never could read.

Court: What's the date of this letter?

Mr. Hamrick: April 29th, delivered April 30th.

Court: Has this one been given an exhibit number, the April 29th letter?

(Defendant's Exhibit #1 marked for identification.)

A. What was the question?

Q. If you registered this letter or had a return receipt from him.

A. Yes, sir. This registered letter was registered under Certified #804699 and we received this receipt back at Greenville and on the number one on the back side of this is signed "R. E. Walker" and on line two it's signed "Mrs. C. H. Walker".

Mr. Hamrick: I take it you're going to offer that.

A. The date is April 30, 1957.

Q. The date of the letter.

A. The date she signed her name to the receipt.

Q. The same date of the letter.

A. April 30, 1957.

Mr. Ward: I offer this Exhibit #2.

(Defendant's Exhibit #2, receipt, received in evidence.)

A. No, sir, it's not the same date as the letter. The letter is dated April 29, 1957, and the receipt, which is signed by Mrs. Walker, is April 30, 1957.

Q. I beg your pardon, it's my mistake, not yours. Mr. Brosnan, after the mailing of that letter state whether or not Mr. Walker responded to that letter by either answering it by mail or protecting his seniority or taking any other action in connection with any responsibility he owed to the railroad.

A. Mr. Walker at no time between the time of April 29, [fol. 41] when this letter was written, and within thirty

days contacted my office by telephone or by letter, during the thirty-day period that he had to return for duty.

Q. His having failed to respond to your notice to protect his seniority, state what you then did.

A. On May 30, 1957, I wrote Mr. Roy Walker, Route 1, Box 102, Forest City, North Carolina, "Dear Sir: Please refer to my letter dated April 29, 1957, advising you to protect your seniority within 30 days. You did not report and protect your seniority as instructed and this is to advise you under the provisions of the Firemen's Agreement, Article 25 (e) 3, that your name has been stricken from the Firemen's Seniority List and you are no longer considered an employee of the Southern Railway Company. Please turn in all company property you have in your possession to Terminal Trainmaster, Curlee. Yours Very truly, Superintendent", with a copy of this letter to Mr. Curlee, Mr. Webb and Mr. Wheeler.

Mr. Ward: We offer that letter as Exhibit 3.

(Defendant's Exhibit #3 received in evidence.)

Q. Mr. Brosnan, that's the receipt for that last letter. Did you register it?

A. Yes, sir.

Court: Let me see Exhibit 3, please. (It is handed to the Court.)

A. The letter which I just read into this trial was certified under #804695 and was signed by Mr. R. E. Walker. It was delivered apparently on May 31, 1957.

Court: Mr. Brosnan, let me ask you this; in Exhibit 3 the words "protect your seniority" appear; also in Exhibit 1 the words "unless you protect your seniority", what's meant by those words with respect to this case? I can imagine it may mean a whole lot of things but with respect to this case would it have protected Walker's seniority if he had come in during this thirty-day period or written and said, "I'm sick in the hospital", and so on?

A. That is correct and he should have written me and answered my letter.

[fol. 42] Court: Is it fair to say that if he had gotten notice to you or, well, say Brinkley, wasn't Brinkley his Crew Chief or something?

A. Brinkley was the Terminal Trainmaster at Air Line Junction, Charlotte.

Court: If he had written you or Brinkley that he was sick, unable to work, in the hospital, do you say that would have protected his seniority?

A. Your Honor, I'm the only one in the Charlotte Division that would be allowed to write that letter that you see there. Therefore, he should have answered that letter back to me or else phoned me.

Court: I realize that but I notice on Exhibit 1 you are asking Brinkley to "let me know if and when Fireman Walker reports."

A. That's true. What he could have done right there, he could have marked up for work at Air Line Junction. That was the reason I put that on the bottom.

Court: Just suppose—I'm being hypothetical on purpose—suppose he had written you, I know that he didn't, he doesn't even say that he did, but just suppose he had written you during the period and said that he was sick and in the hospital, would that have extended the thing another thirty days or sixty days or six months or what?

A. Well, he wouldn't have forfeited his seniority, I'll say that. Of course, what we would do in there, Your Honor, is we need the man for work, he stood for work, the junior man or the man immediately under him on the seniority roster was working, so that showed that he had . . .

Court: But that doesn't answer my question. Suppose, in response to Defendant's Exhibit #1, Mr. Walker had written you like you say he should have done and says, "I'm sick, I'm in the hospital, I can't work."?

A. That would have taken care of the situation.

Court: I know it would but what I want to know is for how long? It would run out some day. If you didn't hear from him again sometime it's back where it was or you would have had to write him another letter. Is that it?

A. Yes, sir, that's right.

[fol. 43] Court: Thank you, sir.

Q. I believe I had asked you a question, had you answered it, whether he had responded or answered your letter or protected his seniority?

A. At no time did he ever write me or answer this letter or did he ever call my office or notify anyone on the Southern Railway on the Charlotte Division during this period of thirty days which he had to protect his seniority and this is according to the working agreement.

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Mr. Hamrick: Yes, sir. I don't claim we exhausted administrative remedies. I will stipulate that we did not exhaust them.

Court: All you contend is what I stated previously. I'll let you state it, you can state it more accurately. State it for us and then we can agree on it.

Mr. Hamrick: I contend essentially two points wrapped up in three things. One is that Mr. Walker went to Mr. Brinkley and told him that he was in the hospital. Another is that Dr. Harris gave Mr. Walker a letter saying that Mr. Walker was unable to work on May 11 or 12, in there, and mailed that to the railroad.

Court: And the first one was April 9?

Mr. Hamrick: April 9, yes, sir. The other contention is that they took his seniority before the thirty days ran out.

Court: And those are your only contentions?

Mr. Hamrick: I don't contend that we exhausted the administrative remedies and on those contentions I base my case.

Court: And subsequently there is no evidence and it is stipulated there is no evidence tending to show that he did anything else in June, July or August or whenever, that might be required, as the railroad would contend, by the contract. Now, doesn't that simplify it?

Mr. Hardy: Yes, sir, I think it does. We were of the impression that Mr. Hamrick's position was that he, because he said in the complaint that he did everything he [fol. 44] knew how to do or something to that effect, that he was contending that he had complied with all that was required from him under the contract. If he is going to stipulate that he did not or his client did not comply with all that was required of him to process the claim in accordance with the contract, that's very well indeed.

Court: All we're trying to do now is tie the facts down. He denies he has to do anything under the contract to bring this lawsuit, as I understand it. But I think it's fair to say that if the Court concludes that the contract requires other conduct by Walker, then Walker concedes he didn't take those steps or make those actions. Is that a fair statement, Mr. Hamrick?

Mr. Hamrick: Yes, sir, a fair statement of it.

Court: But, of course, Walker contends there is nothing else required except the evidence you have offered.

Mr. Hamrick: Undoubtedly after June we went back to talking to the officials of the railroad to come to an agreement on the matter. We did not follow the administrative procedures between the brotherhood and the railroad. We did not do that and we don't contend that we exhausted the administrative procedures. We contend that it is not necessary.

Mr. Ward: Certainly through the Superintendent until denied and then they took it to the General manager and that was denied and then they quit. I am sure Your Honor is familiar with the case of Justice against the Railroad.

Court: All right, maybe this pinpoints the fact questions a little better.

Mr. Hardy: I don't believe it will hurt anything to have them and it may clarify it. It is our position that the first letters written by Mr. Morrow were written within the time that steps were required to be begun but that those steps required under the contract were not completed. This may or may not make a difference in Your Honor's ultimate decision on the law question.

[fol. 45] Mr. Hamrick: If we started compliance with the administrative procedures and didn't comply, how is that different from not starting. In other words, I am perfectly willing to say that we did not exhaust our administrative remedies. If we started and quit or didn't start, I don't know why it would make a difference. If it's required that we exhaust administrative remedies before we sue, we didn't do that.

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EDGAR BRINKLEY, a witness for the defendant, having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Edwards:

Q. Give us your full name, please, sir.
A. Edgar Brinkley.
Q. Are you hard of hearing, Mr. Brinkley?
A. Yes, sir, I wear a hearing aid.
Q. Are you now working with the railroad?
A. No, I'm retired.
Q. When did you retire, Mr. Brinkley?
A. Effective with the hour of midnight May 15, 1957.
Q. Were you working with the railroad during the month of March, 1957?
A. Yes, sir.
Q. Did you retire about that time?
A. I retired in May, 1957.
Q. What day in May did you retire?

A. May 15.

Q. That was between the period of the notice that was spoken about a while ago, between April 29 and May 29?

A. Yes, sir.

Q. You retired. Now, who took your place? Was it Mr. Curlee?

A. Mr. Curlee, that's right.

Q. Mr. Curlee took your place along about the 15th of May, 1957.

A. That's right.

Q. What was your position with the railroad up until [fol. 46] your retirement?

A. Terminal Trainmaster at Charlotte.

Q. Charlotte Division?

A. Charlotte Terminal.

Q. Is that the one that has been referred to here before as the Air Line Junction?

A. Yes, Air Line Junction Yard.

Q. Now, what were your duties as Terminal Trainmaster, Mr. Brinkley?

A. We are responsible for the operation of the terminal.

Q. What do you mean by the terminal?

A. Railroad terminal, switching yards, passenger station, trains going through, freight trains coming in and being switched up and going out.

Q. As Terminal Trainmaster were you acquainted with the plaintiff Roy Walker?

A. Yes, sir.

Q. How long had you known him?

A. Well, since he came to Charlotte. I think it was about 1944, something like that.

Q. I don't know whether I asked you this or not, when did you come to the Charlotte Division?

A. I come down in 1948.

Q. Was that prior to the time that Mr. Walker came to the Charlotte Terminal? In other words, I'll put it this way, was that prior to the time that Mr. Walker established seniority as a yard fireman on the Charlotte yard?

A. Yes, sir.

Q. Do you recall what date that was?

A. No, sir, I don't.

Q. Do you recall the year that he established yard seniority on the Charlotte yard?

A. No, sir.

Q. During that period that he worked on the Charlotte yard you were Terminal Trainmaster the whole period up until such time as you were relieved by Mr. Curlee, is that correct?

A. That's right.

Q. And you had many occasions to deal with Mr. Walker in connection with his work as a yard fireman?

A. That's right.

[fol. 47] Q. And were you Mr. Walker's immediate superior?

A. Yes, sir.

Q. Now, Mr. Brinkley, have you since you have been associated with the railroad ever been a member of the Brotherhood—I don't recall the name of the Brotherhood but the union Brotherhood?

A. Well, not of the operating Brotherhoods.

Q. Have you ever been a member of any railroad Brotherhood in connection with your railroad work?

A. About 47 years ago now.

Court: Let's go on to something else.

Q. Have you, prior to this time, as a member, if you were a member of the railroad Brotherhood, had occasion to have this question of this thirty-day notice explained to you by your employers and your Brotherhood?

A. When I was a member of the Brotherhood?

Q. Yes, sir.

A. No, sir, I was not a member of that union.

Q. Well, did the union of which you were a member explain the method of determining . . .

Mr. Hamrick: Objection.

Court: Sustained.

Q. Since you've become an officer, so to speak, of the railroad, have you had occasion to deal with the method of determining the thirty-day notice?

A. Oh, yes, sir.

Q. Served under this contract.

A. Yes, sir.

Q. Are you familiar with this contract?

A. Well, I was when I retired.

Q. Between the firemen and the railroad?

A. Yes, sir.

Q. How long have you worked under that contract?

A. Well, this contract has been in effect since 1929.

Q. Well, has it been amended from time to time?

A. It's been amended, yes, sir.

Q. But you are familiar with the terms of this contract?

A. Yes, sir.

Court: Gentlemen, I don't want to cut you too short [fol. 48] but you've got in evidence now the railroad's understanding of the contract. That's been testified to, the way they understand it, and testimony about custom so I don't hardly see what else you can do with it. It's a matter of interpretation.

Mr. Edwards: I was going to show additional testimony on that point.

Court: Let's come quickly to that.

Q. What is your understanding of the method?

A. When it is necessary to order a member of the Firemen's organization back to work, why he is given a thirty-day notice similar to the one that was written in this case and the date of that letter is the first day of the thirty-day period and he must return to duty within thirty days if he protects his seniority.

Q. Now, assuming that you include the first day when would be the hour that that thirty-day period would end?

A. In this particular case the hour of midnight May 28.

Q. In other words, one minute before midnight of the 29th in the morning?

A. Yes, sir.

Q. Now, Mr. Brinkley, during the time that you were Terminal Trainmaster between May 3, 1957, and the date you retired, did you see George Walker?

A. Not that I remember.

Q. Did you have any conversation with him?

A. Not that I remember.

Q. I meant Roy Walker, the plaintiff.

A. Not that I remember.

Q. Did he come to see you during this period of time?

A. If he did, I don't remember.

Q. Did he come to see you at any time after the date he was rolled or marked off the regular board?

A. Not that I remember, no, sir.

Q. Did he, after he was rolled and marked off the regular board, did he place himself on the extra board?

A. No, he did not.

Q. You would know that if he had?

A. Yes, sir.

[fol. 49] Q. Did he come to see you about being sick and bring his daughter over or anything like that while you were there?

Court: April 9, 1957.

A. Not that I remember, no, sir.

Q. Did he bring any doctor's certificate to you or did he mail any doctor's certificate to you?

A. No, sir.

Q. From any doctor saying he was sick?

A. No, sir.

Q. You don't know anything about a doctor's certificate?

A. No, sir.

Q. Did he make a telephone call to your office or were you informed by any personnel in charge that you had received a telephone call from either Mr. Walker or his daughter?

A. No, sir.

Q. During that period prior to the time you were relieved by Mr. Curlee?

A. No, sir.

Q. Mr. Brinkley, these records that are kept of telephone calls and records with reference to the calling of crews and all, do you keep a check on those every day?

A. Keep a check on the crew sheet every day.

Q. Now, does the crew sheet show all matters that might come up pertaining to any telephone calls, for instance?

A. No, sir.

Q. Would it contain a telephone call had there been one made?

A. No, sir.

Q. Where would that be?

A. It wouldn't be any record of a telephone call made except a man calls up to mark off.

Q. That's what I'm getting at. Say he marked off on account of being sick, where would that record be kept?

A. That's on the crew sheet.

Q. Now, how often do you examine the crew sheet?

A. At least two and three times a day.

Q. In other words, you examine it for each three shifts during a 24-hour period?

A. During the first and second shifts and quite often on the third [redacted]t.

[fol. 50] Q. Do you have any recollection of seeing any record made of any telephone call made during that period between March 3 and the day you were relieved by Mr. Curlee?

A. No, sir. No, sir.

Q. And I believe you said you received no letters.

A. The status on the crew sheet at that time would have been shown as just off.

Q. In other words, had a call been made he would have been marked off?

A. When he was rolled from a regular job and stood for the extra board to work and told the Crew Clerk that he was sick and wanted to go home, if that's what he told him, then he would have been marked off on the crew sheet.

Q. And in that event he would have not marked up for the extra board, is that true?

A. That's true.

Q. If he made no such statement, then what would have been his duty with reference to the extra board if he wanted to work?

A. Please say that again.

Q. If he made no such statement, in other words, if he, of his own accord, said he was sick and went home and didn't mark up for the extra board.

A. Then he is just marked off.

Q. In that case, if he expected to work, what would he have to do with reference to the extra board?

A. He would have to mark up.

Q. Otherwise what?

A. If we needed men, we would write him a notice to return to work.

Q. Within thirty days from the date of what date?

A. The date of the letter.

Q. His services were required is the way the contract reads.

A. That's right.

Court: When you want somebody to come back to work on the railroad you don't ever write them and say come back tomorrow or as soon as you can? You want them bad but you don't write them that ever?

A. Your Honor, you have to write that in a certain way because if they don't return by the thirty day time they lost their seniority.

[fol. 51] Court: I know that but I'm asking if you want a man and need him you still write just this language: "This is to advise that you stand for work on your seniority", you don't say, "We need you now, come back tomorrow", you don't ever do that.

A. No, sir. You have to stipulate a date or stipulate the rule or order them back within thirty days. That is

regular procedure I guess on every railroad in the United States.

Court: I don't doubt that part. What I'm wondering about is you can never go beyond that and say we need you and please come back tomorrow. You can't add anything to the letter.

A. No, no, sir.

Q. If a call had been made by a man saying that he was sick, what would be marked on your records? What record would be made of that?

Mr. Hamrick: Objection.

Court: Overruled.

Q. What is the normal procedure in case a man calls up and says he's sick, what do you do?

A. The Crew Clerk marks him off, puts him on the off side.

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W. E. CURLEE, a witness for the defendant, having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Edwards:

Q. What are your initials, Mr. Curlee?

A. W. E. Curlee.

Q. Did you work for the Southern Railway?

A. Yes, sir.

Q. When did you begin to work for the Southern Railway?

A. Since 1937.

Q. Did you enter the service of the Southern Railway at the Charlotte Yard?

A. No, sir.

Q. Did you relieve somebody at the Charlotte Yard?

A. Yes, sir.

Q. Who did you succeed?

A. Mr. Edgar Brinkley, Terminal Trainmaster.

[fol. 52] Q. The man on the stand prior to you?

A. That's right.

Q. What time did you take over at the Charlotte yard, what time of the month and day?

A. May 16.

Q. Of what year?

A. 1957.

Q. What was your position?

A. Terminal Trainmaster.

Q. Of the Charlotte Yard?

A. Yes, sir.

Q. Was Mr. Roy Walker working at that terminal as a yard fireman at that time?

A. He was carried on the seniority list.

Q. He was on the seniority list at that time?

A. Yes, sir.

Q. When you were Terminal Trainmaster at the Charlotte Yard, did Mr. Roy Walker come to see you in response to a letter that he received from Mr. J. R. Brosnan with reference to the protection of his seniority and, if so, when?

A. On May 29, approximately 2:00 to 2:30 P.M. of that evening.

Q. May 29 at when?

A. Approximately 2:00 to 2:30 P.M.

Q. Who was with him?

A. Best I recall, his daughter.

Q. Did you have a conversation with Mr. Walker on that day at that time?

A. Yes, sir.

Q. Will you give the Court the substance of that conversation as near as you remember it?

A. Mr. Walker arrived approximately 2:00 to 2:30 P.M. on May 29 and asked for Mr. Edgar Brinkley, Terminal Trainmaster, and I informed Mr. Walker that Mr. Brinkley had retired and I was filling the Terminal Trainmaster's

position and he said that he came to mark up in lieu of the letter which he had received and he noticed a note on the crew book restricting him from marking up as of midnight May 28.

Q. And what did you tell him in response to that?

A. He told me that he had been sick or that he had been in the hospital.

Q. From the time you came to this job on the Charlotte Yard until the day Mr. Walker came to see you, did you receive any letters or telephone calls with reference to this [fol. 53] matter from Mr. Walker or anyone for him?

A. Absolutely none.

Q. Is there anything in your file that you took over to indicate such a call was made?

A. Absolutely nothing.

Q. In your job as Terminal Trainmaster do you have charge of the crew books?

A. Yes, sir.

Q. The crew sheets, so to speak?

A. That's right.

Q. What are the crew sheets, for our information?

A. The crew sheet is a register, so to speak, giving the names of the employees working on a given date.

Q. If such a telephone call had been made, where would it have been noted?

A. On the crew sheets.

Q. Now, do you in the exercise of your job, or did you in the exercise of your job as Terminal Trainmaster of Charlotte, have charge of those books or have supervision over those crew sheets?

A. Yes, sir.

Q. How often did you check those crew sheets?

A. Many times during the day, 24-hour period.

Q. Did you check them every day?

A. Yes, sir.

Q. Did you check them more than once a day?

A. Yes, sir.

Q. Now, did any of these crew sheets in your checking show any telephone call?

Mr. Hamrick: Objection. The crew sheets would be the best evidence.

Q. Well, did you check them to see?

Court: Overruled. Go ahead.

Q. You said you checked them every day, did you check them on this day?

A. Yes, sir.

Q. Did you find any notations of any telephone calls being made with reference to him being sick?

A. No, sir.

Q. By him or anyone for him?

A. No, sir.

Q. Mr. Curlee, when he was in your office talking about this letter he got, talking about being sick, what did he say to you?

A. He said he had been sick in the hospital and he was of the opinion that his thirty days was up at the night of the 29th of May.

[fol. 54] Q. Did he make any further statement with reference to that part of it?

A. No, sir. I questioned him and asked him if he could have not called in or wrote a letter or had someone to have notified us in that period of thirty days that he had been sick.

Q. What did he say to that?

A. He said he never thought of it. He thought his thirty days was up on May 29th midnight.

Q. He said he never thought of that?

A. Yes, sir.

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J. M. Ford, a witness for the defendant, having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hardy:

Q. Will you state your full name, please sir?

A. J. M. Ford.

Q. By whom are you employed, Mr. Ford?

A. Southern Railway Company.

Q. How long have you been employed by the Southern Railway Company, Mr. Ford?

A. Since 1923.

Q. What is your present position with the Southern Railway Company, Mr. Ford?

A. I am Assistant Director of Labor Relations.

Q. Where is your office located?

A. Washington, D. C.

Q. As an Assistant Director of Labor Relations, Mr. Ford, what are your duties? . . . insofar as firemen are concerned.

A. I handle all claims and grievances that arise under the Collective Bargaining Agreement between the company and the locomotive firemen. By the term dealing with them means I handle correspondence in connection with claims and/or grievances which reach my office on appeal from the lower level.

. . . . . .

[fol. 55] Q. Mr. Ford, I hand you a printed booklet which has been previously identified as the collective bargaining agreement, in all material respects the agreement in effect between Southern Railway Company and the class of employees known as Firemen, Hostlers and Outside Hostler Helpers employed by Southern Railway, said agreement being signed by the Brotherhood of Locomotive Firemen and Enginemen on behalf of those employees. I'll ask you is

that the contract which, in all material respects, is the contract under which Mr. Walker was employed?

A. It is.

Q. Are you familiar . . . .

Court: Before you leave that, how long does that contract last?

Mr. Hardy: These contracts have no terminal date. They are, from time to time, amended, but unlike the contracts in some other industries they are not for fixed periods of time. They are until such time as they are terminated or amended in accordance with the provisions of the Railroad Labor Act.

Court: I think I must have misunderstood either you or Mr. Ward to contend that in no event could the plaintiff recover for the period longer than the contract. That contention was made in chambers. You withdraw it. The contract goes on, apparently.

Mr. Hardy: I'm sorry, I don't recall. That may or may not have been while I was in there, sir. The contract goes on until it is terminated in accordance with the Railroad Labor.

Court: All right. Thank you, sir.

Mr. Ford, I believe you just said you are thoroughly familiar with that contract?

A. I did not. You didn't ask me.

Q. I will ask you, then. Are you thoroughly familiar with that contract?

A. I am.

Q. Do you have occasion in your work to apply and interpret that contract?

A. I do.

[fol. 56] Q. Frequently or occasionally?

A. Daily.

Q. Mr. Ford, I invite your attention to Article 25, Paragraph (e), Paragraph (3), on Page 38 of that contract. Are you familiar with that provision?

A. I am.

Q. Mr. Ford, does that provision provide for a thirty-day period?

A. It does.

Q. Mr. Ford, you were in this courtroom throughout the hearing today, were you not?

A. Yes, sir.

Q. Do you recall a letter written by Supt. Brosnan on April 29, 1957, to Mr. Walker was introduced in evidence?

A. I do.

Q. Have you ever seen a copy of that letter?

A. Yes, sir.

Q. Is that letter the type of letter and in substantially the language customarily used on Southern Railway Company lines when notice is sent to a fireman informing him that his services are needed and that he should report within thirty days?

A. It is typical.

Q. Mr. Ford, when such a letter is written, how is the thirty-day period specified in that letter calculated?

Mr. Hamrick: Objection.

Court: For firemen?

Mr. Hardy: For firemen. We are speaking of a letter written under this section of the firemen's agreement.

Court: Overruled.

A. Would you repeat the question, please?

Q. Would you read the question, please.

(The Court Reporter reads the question on Line 9 above.)

Court: This is, of course, for firemen, not for some other kind of trainmen.

Mr. Hardy: That is correct, sir.

A. Calculated from the day the letter is written, meaning that the first day is the date of the letter.

Q. Is this the uniform and accepted practice in sending letters of this type, Mr. Ford, on Southern Railway Company lines?

A. It is.

[fol. 57] Q. Has it ever, to your knowledge, been questioned by the Brotherhood of Locomotive Firemen and Enginemen who represent firemen on Southern Railway lines?

Mr. Hamrick: Objection.

Court: Overruled.

A. Not to my knowledge.

Court: Have you ever had the question come up before this case where it is of critical importance?

A. Not in my time.

Q. Mr. Ford, I invite your attention to Article 32 of this same contract, Paragraph (b), headed "Grievances". I will ask you if that is the contract procedure to be followed by an employee or his representative or attorney in progressing claims or grievances which he may have arising under that contract?

Mr. Hamrick: Your Honor, the contract is in evidence and I have stipulated I am not going on any administrative remedies. I don't mean to belabor the point.

Court: Counsel agree it is Article 32. Let's go on to something else.

* * * * * * *

W. P. Barton, a witness for the defendant, having first been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Edwards:

Q. State your name, please.

A. W. P. Barton.

Q. Mr. Barton, are you now working with the Southern Railway?

A. No, sir, I have been retired for two years.

Q. Have you in the past worked for the Southern Railway?

A. Yes, sir, I have.

Q. Were you working with the Southern Railway on April 29, 1957?

A. Yes, sir.

Q. In what capacity.

A. Division Chief Clerk at Greenville.

[fol. 58] Q. In what office?

A. Superintendent's office.

Q. The Superintendent Mr. Brosnan?

A. That's right.

Q. Now, you were in court when the letter was introduced, were you not, the letter of April 29, 1957, addressed to Mr. Walker from Mr. Brosnan to come in and protect his seniority?

A. Oh, yes.

Q. Have you ever seen that letter or did you see that letter before it was mailed?

A. I dictated it for the Superintendent's approval and signature.

Q. You dictated the letter yourself?

A. That's right.

Q. After you dictated the letter and it was prepared, did Mr. Brosnan read it and sign it?

A. Yes, sir.

Q. Did you mail it yourself?

A. No, sir, I do not personally take letters to the Post Office.

Q. When do you send your mail out?

A. That was a certified special delivery letter, as I recall, and it was mailed the day it was written.

Q. Did you send it registered mail?

A. Yes, sir.

Q. Did you get a return receipt?

A. Yes, sir. Oh, yes, yes we did.

Q. Stating the letter had been received?

A. Yes.

Q. Did you have, during that thirty-day period, any communication from Mr. Walker?

A. I did not.

Q. You know nothing further about it?

A. That's right.

Q. The thirty-day period in the letter is what I meant.

A. Yes, I understand.

* * * * * * *

Redirect examination.

By Mr. Edwards:

Q. Mr. Barton, after this period, in other words about the 30th day of May, which is one day after he says he was in Charlotte, did you see Mr. Walker in Mr. Brosnan's office?

A. Yes, sir.

Q. You did?

A. Yes, sir.

[fol. 59] Q. Did Mr. Walker have a conversation with Mr. Brosnan?

A. He did.

Q. What did he say in that conversation?

A. He said that he had come down to tell Mr. Brosnan that he had no ill feeling against the company, he had no complaint with the decision and that he was going back home and stay there.

Q. Did he make any mention about being sick?

A. No, sir.

Q. He didn't say anything about that. Who was with him when he came to Mr. Brosnan's office?

A. He was alone.

Q. You were there and who else?

A. Mr. Brosnan.

Q. Was anyone else present?

A. No one else.

Q. Did he make any other statements about anything in connection with this notice? Did he make any other statements in your presence?

A. I don't recall anything else.

• • • • • • •

COLLOQUY BETWEEN COURT AND COUNSEL

Court: Now may I ask you some questions. You perhaps better take my questions down, Mrs. Berger. Referring to Defendant's Exhibit #1 written on April 29, 1957, how do you interpret the contract with respect to when this letter was written and here's what I mean. Could it have been written by the Superintendent, well, say a month earlier if he had wanted Walker to come back to work a month earlier? Is there a cutoff period involved that dictated the date of the letter, April 29?

Mr. Hardy: Let me see if I understand Your Honor. On April 29, 1957, I take it, that Supt. Brosnan needed Mr. Walker's services and therefore sent him this letter. Now, I don't know because I don't believe it's in evidence. I honestly don't know whether Mr. Brosnan needed Mr. Walker's services before that date, a month before that date or not. If he had needed him a month before that date I suppose he would have written him the letter, I don't know, sir.

[fol. 60] Court: How do you interpret the contract with respect to assuming that on April 9—I'm not deciding this, just assuming on April 9 Walker did talk to Brinkley as the evidence tends to show for the plaintiff. Does that do something under the contract? Does it start a period running of thirty or sixty days before he can be required to come back?

Let me withdraw that one because that's hard. That's related to this case. Let me make it hypothetical. What would have been the effect if on May 11, for example, just suppose Walker had written to the right man, whether it's Brosnan or who, he had written the right man and just

told him the truth, I'm sick, I'm in the hospital, dated May 11, what is the effect of that under the contract?

Mr. Hardy: As I understood Mr. Brosnan's testimony, if a letter had been received from Mr. Walker by the right man saying he was sick and unable to report and would be unable to report within the period allowed him, I understood Mr. Brosnan to say that he would have taken care of it.

Court: Do you agree with Mr. Brosnan's interpretation of it as counsel for the railroad?

Mr. Hardy: Yes, sir.

Court: Is there anything in this long contract between the railroad and the union that specifies the effect of illness on a period such as this, does it spell it out?

Mr. Hardy: Is there anything in the contract which specifies a period of illness?

Court: Yes.

Mr. Hardy: I know of nothing. If Your Honor please, these contracts are made against a background of practice. That is one of the reasons that we, as well as other hearings, find them so strange in form and content.

Court: I agree. That's why we've got a Railroad Adjustment Board, for one reason.

Mr. Hardy: That's right, sir.

[fol. 61] Court: There is some evidence tending to show that on March 7 at 9:00 P.M. that Mr. Walker's daughter telephoned. I'm not trying to decide now whether this is true or false but assuming that it is true, does that have a legal effect on the letter of April 29?

Mr. Hardy: The March 7 call, as I see it, sir, does not have any effect on the period April 29 and thirty days after.

Court: I think you mean that nothing that happened before the letter of April 29, is your contention, would have any effect on that letter.

Mr. Hardy: I would be happy to explain why. Early in March, the 10th or 11th . . .

Court: March 7th was the telephone message.

Mr. Hardy: Well, now, from March 7 through virtually the end of April is something like seven weeks. Assuming the lady called up, of which we have no record, and if you just call in and say, My father is sick, he can't come to work and you don't say for how long, I think nothing strange that seven weeks later a superintendent, having no further information—as a matter of fact he didn't have this, but suppose he did—would not have any reason to assume he was still sick or assume he wasn't.

Court: Applying this same expertise of the N.L.R.B. or the Railroad Adjustment Board, which you need in this area and perhaps we lack, about the letter of May 11, if there was one, if that letter of Dr. Harris was mailed to Mr. Brinkley about May 11, as I understand it it's more a matter of common sense than a special provision of the contract. You can see, and Brosnan said—I've been over this with you—that sort of kills this letter of April 29. He's got to write another one, wait a reasonable period and write another one.

Mr. Hardy: It's a matter of common sense, yes, sir.

Court: Thank you, sir.

(Mr. Hamrick is heard in argument.)

[fol. 62] Court: Do you still insist North Carolina law applies?

Mr. Hardy: This contract was being performed in North Carolina. What page was that on?

Mr. Hamrick: On Page 128.

Mr. Hardy: There are various memoranda of understanding subsequent to this contract and the last page I don't think is the page that . . .

Court: Is it fair to say that if Walker has any rights he's got them under this union contract. He's got no common law contract.

Mr. Hardy: No, sir.

Court: I think he agrees to that.

Mr. Hamrick: Yes, sir. It also says on Page 102, Washington, D. C., February 26, 1941.

[fol. 63]

DEFENDANT'S EXHIBIT No. 3

Mr. Roy Edmund Walker,
Route 1,
Box 102,
Forest City, N.C.

Dear Sir:

Please refer to my letter dated April 29, 1957 advising you to protect your seniority within 30 days.

You did not report and protect your seniority as instructed and this is to advise you under the provisions of the Firemen's Agreement, Article 25 (e) 3, that your name has been stricken from the Firemen's Seniority list and you are no longer considered an employee of the Southern Railway Company.

Please turn in all company property you have in your possession to Terminal Trainmaster Curlee.

Yours very truly,

Superintendent

Blind:
Mr. Curlee:
Mr. Webb:
Mr. Wheeler:

[fol. 64]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9967

ROY WALKER, Appellee,

versus

SOUTHERN RAILWAY COMPANY, Appellant.

No. 9968

ROY WALKER, Appellant,

versus

SOUTHERN RAILWAY COMPANY, Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. J. B. Craven, Jr., Chief District Judge.

OPINION—December 22, 1965

[fol. 65] Argued November 3, 1965.

Before Haynsworth, Chief Judge, Bryan, Circuit Judge, and Michie, District Judge.

Jerome Ackerman (W. Graham Claytor, Jr., James I. Hardy and Harold K. Bennett, and Covington & Burling on brief) for Appellant in No. 9967 and Appellee in No. 9968, and J. Nat Hamrick for Appellee in No. 9967 and Appellant in No. 9968.

ALBERT V. BRYAN, Circuit Judge:

Roy Walker, a fireman on the Southern Railway Company, may recover damages of $4500 from the railroad, the District Court has held, for terminating his seniority, as a result of which he was not allowed to work. The assessment was based on the finding that it was a discharge in violation of the collective bargaining agreement between the railroad and his union. Both Walker and Southern appeal.

The facts are simple. Reporting for work on March 3, 1957 Walker found he had been displaced in his job by a fireman with superior seniority. Whereupon he told the [fol. 66] crew clerk he was sick and was going home. According to his testimony he kept the officials apprised of his continued illness and inability to work. On April 29, 1957 the railroad wrote him that "you stand for work on your seniority and unless you protect your seniority within 30 days from the date of this letter, you will have forfeited your seniority". Authority for the 30-day stipulation was the collective bargaining agreement. As of May 28, 1957 at midnight the Southern cancelled his seniority, holding ineffective—as a day beyond the 30 days—his appearance on May 29 to preserve his seniority. However, the Court upheld Walker's contention that a correct counting of the 30 days gave him until May 29 to prevent the forfeiture.

The railroad now contends that the District Court was without jurisdiction because the complainant had not first exhausted the grievance procedures provided in the collective bargaining agreement and the privilege of a review by the National Railroad Adjustment Board under the Railway Labor Act, 45 USC 151, 153(i). The employee assigns as error mitigation by the Court of his damages, saying there was no evidence disclosing other earning opportunities open to him after leaving the Southern.

We must sustain the railroad's appeal. At the time of the District Court's decision the law clearly permitted an immediate suit by a discharged employee against his railroad

for a breach of the collective agreement when, as here, the employee asked money damages only and not reinstatement. *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 US 653 (1953); *Slocum* v. *Delaware & W. RR*, 339 US 239 (1950); *Moore* v. *Illinois Central RR*, 312 US 630 (1941). But closely following the entry of judgment in this action, the Supreme Court decided *Republic Steel Corp.* v. *Maddox*, [fol. 67] 379 US 650 (1965). Although that case did not deal with a railroad employee, nevertheless we read the opinion as requiring in our case an exhaustion of remedies both under the collective bargaining agreement and before the Adjustment Board prior to suit. Cf. *Neal* v. *System Board of Adjustment*, 349 F2d 722, 727 (8 Cir. 1965).

Specifically, *Maddox* denied judicial recourse to the discharged employee until he had "attempt[ed] use of the *contract* grievance procedure agreed upon by employer and union as the mode of redress." (Accent added.) True, the opinion observed that the Court did not mean to overrule *Moore* v. *Illinois Central RR*, supra, 312 US 630, "within the field of the Railway Labor Act", 379 US at 657, fn. 14; but the ratio decidendi embraces the instant controversy.

The next question, presently, is whether the influence of *Maddox* also compels railroad employee to take advantage of a review by the Railroad Adjustment Board. There the question was, of course, not expressly before the Court, but it is before us if Walker is to be saved from further court litigation. On the basis of the *Maddox* decision we hold that, if the employee does not prevail on the contract remedies, then before instituting a lawsuit he must petition review by the National Railroad Adjustment Board. 45 USC 153(i). See *Beebe* v. *Union RR*, 208 A2d 16 (Pa. Super. Ct. 1965).

The Board was obviously created to answer just the type of complaint now before us. The admonishment of the Railway Labor Act, supra, 45 USC 152 that "[I]t shall be the duty of all carriers . . . and employees to exert every reason-

able effort . . . to settle all disputes, . . . arising out of the [fol. 68] application of . . . agreements" warrants the demand that such differences be first submitted to the very agency erected to resolve them. Cf. *Brotherhood of RR Trainmen* v. *Chicago R. & I. RR*, 353 US 30, 34-39 (1956); *Gunther* v. *San Diego & A.E. Ry.*, 34 U.S.L. Week 4058 (U.S. Dec. 8, 1965).

The imposition of this condition was, seemingly, foreshadowed by *Pennsylvania RR* v. *Day*, 360 US 548 (1959), where the Court held that the Railroad Adjustment Board had exclusive primary jurisdiction over a retired railroad employee's complaint arising under a collective bargaining agreement. This is the trend of relevant Federal decisional law: that disputes rooted in a collective bargaining agreement should be brought to the Board for resolution before resort to the courts. National uniformity in decision and expertness in understanding the problems are among the advantages urging the preference. *Union Pacific RR* v. *Price*, 360 US 601 (1959); see also *Gainey* v. *Brotherhood of Railway & Steamship Clerks*, 275 F2d 342, 343 (3 Cir. 1960).

The need and place of the Board are pointedly exampled now. The rightfulness of Walter's discharge depends upon the method of calculating the time stipulated by the collective agreement within which he had to "return to active service" to avoid forfeiture of seniority. According to his computation his return was punctual, under the railroad's reckoning he was too late. Thus not only is there a need for uniformity in interpretation here, but the determination of the controversy calls for railroad-labor knowledgeability, something possessed in the highest degree by the Adjustment Board. See *Gunther* v. *San Diego & A.E. Ry., supra*, 34 U.S.L. Week 4058 (Dec. 8, 1965).

[fol. 69] Letters in the record reveal that the railroad asked the attitude of the union upon the railroad's action in respect to Walker. In response the union expressed approval and suggested that "the matter rest as it is". From

this, counsel for Walker argues that remand of his claim to the contract grievance processes would be unfair, since it has thus already been rejected by both the railroad and the union, who are responsible for and supervise the prosecution of these remedies. Notwithstanding, we cannot anticipate that the union will not fulfill any obligation it may have under the duty of fair representation owed to Walker under the collective bargaining agreement. At all events, Walker should give the union an "opportunity to act on his behalf." *Republic Steel Corp.* v. *Maddox,* supra, 379 US at 653.

"If the union refuses to press or only perfunctorily presses the individual's claim," he has his remedies as the Court intimates in *Maddox,* 379 US at 652. Among others, he may himself follow through on the intramural steps and the Adjustment Board review just discussed. 45 USC 153(i); but cf. *Wade* v. *Southern Pacific Co.,* 243 FSupp. 307 (S.D. Texas 1965). If the time limitations of the internal remedies are interposed to preclude a hearing, the fairness of their application could also be tested before the Board.

Consequently, the judgment on appeal should be vacated and the action returned to the District Court for dismissal. Each party will bear his and its costs here.

Vacated and remanded for dismissal.

[fol. 70]

IN THE UNITED STATES COURT OF APPEAL

FOR THE FOURTH CIRCUIT

No. 9967

ROY WALKER, Appellee,

vs.

SOUTHERN RAILWAY COMPANY, Appellant.

JUDGMENT—December 22, 1965

Appeal from the United States District Court for the Western District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, vacated; that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of North Carolina, at Asheville, for further proceedings consistent with the opinion of the Court filed herein; and that each party bear its own costs on appeal.

December 17th, 1965.

Albert V. Bryan, United States Circuit Judge.

[fol. 71]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 9968

ROY WALKER, Appellant,

vs.

SOUTHERN RAILWAY COMPANY, Appellee.

JUDGMENT—December 22, 1965

Appeal from the United States District Court for the Western District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of North Carolina, at Asheville, for further proceedings consistent with the opinion of the Court filed herein; and that each party bear its own costs on appeal.

December 17th, 1965.

Albert V. Bryan, United States Circuit Judge.

[fol. 72] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 73]

SUPREME COURT OF THE UNITED STATES

No. 1129—October Term, 1965

ROY WALKER, Petitioner,

v.

SOUTHERN RAILWAY COMPANY.

ORDER ALLOWING CERTIORARI—May 2, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

....., Term 1966

No. 1129 89

ROY WALKER,

Petitioner,

v.

SOUTHERN RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

....., Term 1966

No. .....

ROY WALKER,

Petitioner,

v.

SOUTHERN RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Roy Walker prays that a Writ of Certiorari issue to review the Judgments of the United States Court of Appeals for The Fourth Circuit entered in the above-case on December 22, 1965.

OPINION BELOW

The Opinion of the District Court for the Western District of North Carolina (Appellant's App. I A-17 and Appellee's App. II 1), is reported in 237 F. Supp. 278. The Opinion of the Court of Appeals for the Fourth Circuit (R. 11, 45), is not yet reported.

JURISDICTION

The Judgments of the Court of Appeals for the Fourth Circuit were made and entered on December 22, 1965 (R. 18, 52), and copies thereof are attached to this Petition in the Appendix at pp. 1-11. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner Roy Walker was employed by Respondent Southern Railway Company in the early 1940's and worked for it until his seniority was taken on May 28, 1957, at twelve o'clock midnight.

The facts leading up to Petitioner's dismissal are as follows:

Petitioner was informed by crew clerk on March 3, 1957, that he had been "rolled for a regular job." This meant in railroad parlance, that a man with greater seniority had taken over his job. Petitioner then informed the crew clerk that he was sick and was going home. Upon his arrival at home he became seriously ill, underwent an operation and caused a call to be made to the yardmaster in Charlotte, North Carolina, telling him that he was sick and could not work. Petitioner also obtained a doctor's certificate to the effect that he was unable to work and sent it to Mr. Edward R. Brinkley, Respondent's Terminal Trainmaster, on May 11, 1957. Petitioner had previously seen Mr. Brinkley about April 9, 1957, and told him verbally that because of an operation and adhesions he was unable to work.

On April 29, 1957, the railroad wrote him that, "You stand for work on your seniority and unless you protect your seniority within thirty days from the date of this letter, you will have forfeited your seniority." This letter was signed for by Petitioner's daughter on April 30, 1957.

Petitioner Roy Walker had not heard from Respondent Southern Railway Company and became worried about his position. On the 29th day of May, 1957, at about eleven o'clock a.m., Petitioner Roy Walker went to the Charlotte Office of Respondent Southern Railway Company in order to inform them of his illness. When Petitioner arrived there he was shown a message pinned to the Call Book stating that he would not be allowed to work under any circumstances; that he had forfeited his seniority at midnight on May 28, 1957. This order was signed by J. R. Brosnan, Division Superintendent. Petitioner Roy Walker then went to Greenville, South Carolina, to see Mr. Brosnam who refused to give him any consideration or to reinstate him. Petitioner Roy Walker then filed suit for wrongful discharge. The District Court for the Western District of North Carolina held that Petitioner Roy Walker, by reporting on May 29, 1957, had reported within the thirty days' period and that his discharge was wrongful.

The Court than awarded damages for wrongful discharge. Respondent Southern Railway Company then appealed to the Circuit Court for the Fourth Circuit and shortly after the appeal was entered this Court decided *Republic Steel Corporation* v. *Maddox*.

In its opinion the Circuit Court held that, "At the time of the District Court's decision the law clearly permitted an immediate suit by a discharged employee against his railroad for a breach of the Collective Bargaining Agreement when, as here, the employee asked money damages only and not reinstatement."

The Circuit Court then went on to hold that since the *Maddox* decision this rule no longer obtained and that Petitioner Roy Walker was not entitled to bring suit for wrongful discharge until he had first exhausted his administrative remedies under the Contract.

The Questions presented are:

1. Did Petitioner Roy Walker, have a right to bring suit against the Southern Railway Company for his wrongful discharge on May 28, 1957, when he asked for money damages only and when he had not first pursued any administrative remedy under the contract or filed any petition for review with the National Railway Adjustment Board?

2. If Petitioner Roy Walker had such a right, did the District Court, on January 16, 1965, have a right to enter Judgment in his favor when he had not first pursued any Administrative Remedy under the contract and had not filed any Petition for review with the National Railroad Adjustment Board?

3. If, Petitioner Roy Walker, had a right to bring the suit and if the District Court had a right to enter Judgment for him on January 16, 1965, then, did the opinion of this Court in *Republic Steel Corporation* v. *Maddox*, 379 U. S. 650 (1965), which was decided January 25, 1965 (eight days after the opinion of the District Court in the instant case), destroy Petitioner Roy Walker's right to sue the Southern Railway Company and the District Court's right to enter Judgment for him?

4. Should the holding in *Republic Steel Corporation* v. *Maddox* be extended to suits under the Railway Labor Act when the Labor Management Relations Act, under which *Maddox* was decided, specifically states that it does not apply to actions under the Railway Labor Act (Title 29 U.S.C.A., section 182).

5. Should the holding in *Republic Steel Corporation* v. *Maddox* be extended to the instant case when *Maddox* was a suit for severance pay and the instant case is one for money damages by reason of wrongful discharge?

6. Do the Administrative Remedies under the Railway Labor Act provide a wrongfully discharged employee with the same redress and the same remedies he can obtain by bringing his suit at law for money damages for wrongful discharge?

7. Does the opinion of this Court in *Republic Steel Corporation* v. *Maddox* require that Federal Law and not State Law be applied to all suits by Railroad employees against Railroads for wrongful discharge when those suits ask for money damages only?

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

Title 29 U.S.C.A. section 182

Title 28 U.S.C.A. section 1254(1)

STATEMENT

Petitioner Roy Walker was discharged by Respondent Southern Railway Company on May 28, 1957. He later brought suit in the Superior Court of Rutherford County, North Carolina, alleging wrongful discharge. Respondent Southern Railway Company filed a petition to remove the case to the United States District Court for the Western District of North Carolina on the grounds of the amount involved and diversity of citizenship. This motion was granted and the cause removed to the District Court for the Western District of North Carolina.

Shortly thereafter at a pre-trial conference Peitioner voluntarily dismissed that part of his complaint in which he had asked for reinstatement in addition to monetary damages thus leaving only a suit against Respondent Southern Railway Company for money damages by reason of his wrongful discharge.

The cause came on for trial without a jury before Craven, Chief Judge.

At the trial it was stipulated that Petitioner Roy Walker had not exhausted his administrative remedies or filed any petition with the National Railway Adjustment Board before bringing suit for wrongful discharge.

As the trial progressed Petitioner Roy Walker's evidence showed that he had been employed by Respondent Southern Railway Company from the early 1940's until May 28, 1957. The evidence further showed that Petitioner Roy Walker was informed by a crew clerk on March 3, 1957, that he had been "rolled for a regular job." This meant in railroad parlance that a man with greater seniority had taken over his job.

Petitioner Roy Walker went home and was sick for sometime. He caused a call to be made to the yardmaster telling him that he was sick and could not work and obtained a doctor's certificate from Dr. T. R. Harris to the effect that he was unable to work and sent it to Mr. Edward R. Brinkley, Southern Railway Company Terminal Trainmaster, on May 11, 1957. Petitioner Roy Walker had previously seen Mr. Brinkley about April 9, 1957, and told him that because of an operation and adhesions he was unable to work.

On April 29, 1957, a letter was sent, certified mail, by Respondent Southern Railway Company's Superintendent to Mr. Walker and was signed for by Petitioner Walker's daughter on April 30, 1957. This letter advised Petitioner Walker to protect his seniority within thirty days from the date of that letter or he would forfeit it. Accordingly Petitioner Roy Walker reported to Charlottee on the 29th day of May, 1957, about eleven o'clock a.m. in order to protect his seniority. When Petitioner arrived he was shown a

message pinned to the Call Book stating that he would not be allowed to work under any circumstances, that he had forfeited his seniority at midnight on May 28, 1957. This was authorized and signed by J. R. Brosnan Division Superintendent. Petitioner Walker then went to Greenville, South Carolina, to try to explain to Mr. Brosnan that he was sick but Mr. Brosnan refused to give him any consideration and informed him that he was discharged. Petitioner Walker contended that he had protected his seniority within the allotted time and Respondent Southern Railway Company contended that in order to protect his seniority he should have reported by midnight May 28, 1957.

At the trial it was stipulated by Petitioner Walker that he had not exhausted his administrative remedies before commencing suit.

On January 16, 1965, the District Court rendered a decision in favor of Petitioner Roy Walker and granted him damages in the amount of $4500.00.

In reaching this decision the District Court held that Petitioner Roy Walker was not required to exhaust his administrative remedies or file a petition with the National Railroad Adjustment Board before bringing suit because his rights in this regard were governed by the North Caroline Law and that Law did not require exhaustion of administrative remedies or petition to the National Railroad Adjustment Board before bringing suit when claimant sought only money damages.

The District Court further held that Petitioner Roy Walker had protected his seniority by reporting within the thirty days and that his discharge was wrongful.

Respondent Southern Railway Company gave notice of appeal to the Fourth Circuit and on January 25, 1965, this Court decided *Republic Steel Corporation* v. *Maddox*. The

instant case was later heard by the Fourth Circuit on November 3, 1965; and on December 22, 1965, Albert V. Bryan, Circuit Judge of the Fourth Circuit, rendered a decision for the Circuit reversing the District Court, vacating the Judgment, and ordering the case remanded to the District Court for dismissal.

The basis for the Circuit Court's decision was that *Republic Steel Corporation* v. *Maddox* required that a railroad employee must exhaust his administrative remedies both under the Collective Bargaining Agreement and before the National Railroad Adjustment Board prior to suit and completely ignored the question of whether or not the State Law of the Contract required such an exhaustion of remedies before suit.

The Circuit Court reached this decision in spite of the fact that this Court in the *Maddox* case specifically stated that, ". . . by refusing to extend *Moore* v. *Illinois Central RR. Co.*, to section 301 suits, we do not mean to overrule it within the field of the Railway Labor Act."

REASONS FOR GRANTING THE WRIT

The Fourth Circuit held that Petitioner Roy Walker whom the District Court found had been wrongfully discharged by Respondent Southern Railway Company could not bring suit for such wrongful discharge even though he asked for money damages only, until he had; *first:* exhausted the administrative remedies provided for in the Collective Bargaining Agreement; and, *second:* filed a petition for a review with the National Railroad Adjustment Board in the event the administrative decision was adverse to hm.

This decision of the Fourth Circuit is in conflict with the following decisions of this Court. In *Moore* v. *Illinois Cen-*

tral Rly. Co., 312 U. S. 630, 61 Supreme Court 754, 85 L. Ed. 1089 (1941). This Court held that a Railroad employee was not required to exhaust his administrative remedies under the contract or file a petition with the National Railroad Adjustment Board before instituting in Court a suit for wrongful discharge in which he asked for money damages only. Justice Black made the position of this Court very plain when he said on Page 634 of the U. S. and on Page 756 of the Sup. Ct.:

> "But RESPONDENT says there is another reason why the Judgment in its favor should be sustained. This reason according to Respondent, is that both the District Court and the Circuit Court of Appeals erred in failing to hold. Moore's suit was prematurely brought because of his failure to exhaust the administrative remedies granted to him by the Railway Labor Act. . . . But we find nothing in that act which purports to take away from the Courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a pre-requisite to filing a suit in Court. . . ."

and on page 636 of the U. S. Justice Black continued . . .

> "The District Court and the Circuit Court of Appeals properly decided that Petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the Railroad as a pre-requisite to suit for wrongful discharge. . . ."

The above decision was re-examined and approved in the case of *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 Sup. Ct. 577, 94 L. Ed. 795.

Where Justice Black again speaking for the Court says on Page 244 of the U S.:

"Our holding here is not inconsistent with our holding in Moore v. Illinois Central RR. Co., 312 U.S. 630, 85 L. Ed. 1089, 61 Sup. Ct., 754. Moore was discharged by the Railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar Courts from adjudicating such cases. A common law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees."

Also, in *Transcontinental and Westernaire* v. *Koppal,* 345 U. S. 653, 73 Sup. Ct. 906, 97 L. 1325 (1953), this Court reiterated its position that the Railway Labor Act did not require exhaustion of Remedies or Petition to the National Railroad Adjustment Board before suit and in addition thereto stated in specific terms that whether or not such remedies had to be exhausted before wrongful discharge suit for money damages depended on the applicable State law. Justice Burton, speaking for the Court, said on Page 661 of the U. S. and Page 1330 of the L. Ed.:

"The result is that, whereas, under the Railway Labor Act, the Adjustment Board has exclusive jurisdiction to adjust grievances and jurisdictional disputes of the type involved in the Slocum case. That Board does not have like exclusive jurisdiction over the claim of an employee that he has been unlawfully discharged, such an employee may proceed either in accordance with the Administrative procedures prescribed in his employment contract or he may resort to his action at law for alleged unlawful discharge if the *State Courts recog-*

nize such a claim (Italics ours), where the applicable law permits his recovery of damages without showing his prior exhaustion of his remedies, he may so recover, as he did in the Moore litigation, supra, under Mississippi Law.

"On the other hand if the applicable local law, as is Missouri, requires an employee to exhaust his administrative remedies under his employment contract in order to sustain his cause of action, he must show that he has done so. Here respondent was employed by a carrier subject to Title Two of the Railway Labor Act, and his employment contract contained many administrative steps for his release, all of which were consistent with the act. Accordingly, while he was free to resort to the Courts for relief, he was there required by the law of Missouri to show that he had exhausted the varied administrative procedures contemplated by the Railway Labor Act. In the instant case he was not able to do so and his complaint was properly dismissed."

The Circuit Court recognized that the *Moore, Slocum* and *Koppal* cases decided by this Court clearly permitted the instant suit at the time it was brought and at the time the Judgment of the District Court was rendered. This is clearly shown by the following language in the opinion of the Circuit Court:

"At the time of the District Court's decision the law clearly permitted an immediate suit by a discharged employee against his railroad for a breach of the Collective Bargainning Agreement, when, as here, the employee asked money damages only and not reinstatement. Transcontinental and Westernaire Inc. v. Koppal, 345 US 653 (1953); Slocum v. Delaware & W. RR., 339 US 239 (1950); Moore v. Illinois Central RR., 312 US 630 (1941)."

After recognizing this fact the Circuit Court nevertheless then came to the conclusion that the decision of this Court in *Republic Steel Corporation* v. *Maddox* required the Circuit Court to ignore *Moore, Slocum,* and *Koppal,* and, in effect, overrule them when this Court in the *Maddox* opinion had expressly declined to do so. This is shown by the following language in the Circuit Court's decision:

> "But closely following the entree of Judgment in this action the Supreme Court decided Republic Steel Corp. v. Maddox, 379 US 650 (1965), although the case did not deal with a railroad employee, nevertheless we read the opinion as requiring in our case an exhaustion of remedies both under the Collective Bargaining Agreement and before the Adjustment Board prior to suit. Cf. Neal v. System Board of Adjustment 349 F. 2d 722, 727 (8 Cir. 1965). [This citation is incorrect—should be 348 F. 2d 722, 727.]
>
> "'Specifically Maddox denied judicial recourse to the discharged employee until he had attempted use of the contract grievance procedure agreed upon by employee and union as the mode of redress.' (Accent added) True, the opinion observed that the Court did not mean to overrule Moore v. Illinois Central RR., supra, 312 US 630, 'Within the field of the Railway Labor Act,' 379 US at 657, fn. 14; but the ratio decidendi embraces the instant controversy."

Thus the decision of the Fourth Circuit in this case is in direct conflict with the following opinions of this Court. *Moore* v. *Illinois Central RR. Co.*, 312 US 630, 85 L. Ed., 1089, 61 Sup. Ct., 754 (1941); *Slocum* v. *Delaware, L. & W. RR. Co.*, 339 US 239, 70 Sup. Ct., 577, 94 L. Ed., 795 (1950); *Transcontinental & Westernaire, Inc.* v. *Koppal*, 345 US 653, 73 Sup. Ct. 906, 97 L. Ed. 1325 (1953).

CONCLUSION

It is, therefore, quite apparent that the decision of the Fourth Circuit is in conflict with the decisions of this Court in the particulars set out above and this Court should allow this Petition for Certiorari in order to make it clear whether or not the Federal Law requires a railroad employee to exhaust his administrative remedies and petition the National Railroad Adjustment Board before bringing suit for wrongful discharge; and, if not, whether the State Law of the Contract or the Federal Law must be consulted to determine whether or not such remedies must be exhausted before suit.

Respectfully submitted,

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APPENDIX

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Judgment, dated January 18, 1965

CRAVEN, Chief Judge:

This is an action by Roy Walker to recover damages for breach of his employment contract with the Southern Railway Company. Originally filed in the Rutherford County Superior Court on August 15, 1963, it was removed on petition of Southern, by reason of diversity of citizenship, to this court.

Until his discharge as of 12:00 midnight, May 28, 1957,[1] Walker had been in Southern's employ approximately thirteen years, the latter portion of which he worked as a fireman.

On March 3, 1957, Walker was notified by a crew clerk for Southern that he had been "rolled for a regular job". In less colloquial language this means that Walker was displaced on his job by another fireman because of the latter's higher seniority. Walker then left, saying that he was sick and was going home.

By letter dated April 29, 1957, Walker was informed by J. R. Brosnan, Southern's Division Superintendent, that unless he "protected" his seniority within 30 days from the date of the letter his seniority would be forfeited. A postal certificate shows that the letter was received and signed for by Walker's daughter-in-law on April 30, 1957. Walker was in the Gardner-Webb Medical Clinic recuperating from an operation, and did not actually see the letter until May 2, 1957.

As of midnight on May 28, 1957, Southern treated Walker's seniority as having been forfeited. The next day (May 29th) Walker appeared at the office of Southern in Charlotte seeking to protect his seniority, but was told that

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[1] Defendant has not pleaded any statute of limitations. Fed. R. Civ. P. (8).

he had already lost it. Walker subsequently traveled to Greenville, South Carolina, to ask Mr. Brosnan to reinstate him. Reinstatement was denied, whereupon this suit to recover damages for breach of contract was instituted.[2]

JURISDICTION

If a discharged railroad employee elects to seek reinstatement (with or without back pay), the National Railroad Adjustment Board has primary jurisdiction to the exclusion of both state and federal courts. But if the employee accepts his discharge as final, and such is the situation here, he may bring an action at law for damages. *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239, 70 S. Ct. 577, 94 L. Ed. 795 (1950); *Moore* v. *Illinois Central R. R. Co.*, 312 U.S. 630, 61 S. Ct. 754, 85 L. Ed. 1089 (1941).

Walker did not exhaust administrative remedies available to him under the collective bargaining agreement between Southern and the Union. Southern not unreasonably contends that his failure to do so bars this action, and that exclusive jurisdiction is in the National Railway Adjustment Board. Whether he must show that he has exhausted his administrative remedies under the contract depends upon the applicable state law. *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653, 73 S. Ct. 906, 97 L. Ed. 1325 (1953).

In *Haynes* v. *Winston-Salem Southbound Ry. Co.*, 252 N.C. 391, 113 S.E. 2d 906 (1960), the North Carolina Supreme Court held that a railroad employee who accepts his discharge as final and brings an action to recover damages for breach of contract is not required to exhaust his administrative remedies before maintaining the action. Southern, in its brief, cites *Charlotte City Coach Lines, Inc.*

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[2] Walker originally sought reinstatement also. That part of the complaint has been dismissed.

v. *Brotherhood of Railroad Trainmen,* 254 N.C. 60, 118 S.E. 2d 37 (1961), for the proposition that North Carolina law *does* require exhaustion of administrative remedies before maintaining an action for breach of contract.

The *Charlotte* case was decided after *Haynes,* but they are clearly distinguishable. *Charlotte* was a suit between an employer and a labor union; the court was primarily concerned with the interpretation of a North Carolina statute providing for *arbitration* of employee grievances. In that case the employee, over whom the dispute arose, was *suspended* from his regular job as a passenger bus driver. He was not discharged.

BREACH OF CONTRACT

Coming to the merits, Walker was discharged for one reason only: his alleged failure to "return to actual service" or report for work prior to the expiration of the 30-day limitation period.[3]

Walker informally notified Southern of his illness and inability to work by having his daughter telephone Southern's yard office in Charlotte on March 7, 1957. Again, on April 9, 1957, Walker, accompanied by his daughter and George Padgett, went to Southern's terminal station in Charlotte to pick up a salary check due him. While there, he told Edward Brinkley, Southern's "Trainmaster", that he was unable to work because of an operation and adhesions.

But, regardless of the effect, if any, of such informal notification, Walker contends that under no circumstances was Southern entitled to take his seniority away from him before the 29th of May, 1957, and the fact that it did so

[3] It was assumed at the trial, perhaps because of the employment contract, that the discharge was unlawful if Walker reported for work within 30 days of the notice. The trial proceeded on this premise.

was a violation of his contract. Walker would count the 30-day period from the 29th of April to the 29th of May, i.e., exclude the first day and include the last day.

Southern contends that the proper method of counting the 30-day period is to include the first day (the day the letter was written) and exclude the last day, thereby making the termination date fall on May 28, 1957.

The contractual provision setting forth the 30-day limitation period is silent as to how the period is to be counted.[4] According to Southern, it has not been interpreted in any judicial or administrative proceeding, nor has it been necessary to do so until now.

Southern officials who testified indicated that the customary practice of the railroad was to include the first and exclude the last day, and that the Union was not opposed to such practice. But there was evidence to the contrary. Southern contention is weakened by its admission that never before has time computation been of great importance. Common usage is not established.

Although there is no uniform rule of computing time with respect to the inclusion and exclusion of terminal days, the majority rule is that the time within which an act is to be done is to be computed by excluding the first day and including the last day. 85 C.J.S. 849, "Time" Section 13(1), (3), (7). North Carolina is in accord with this rule.[5] So is

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[4] The provision appears in a handbook titled: *SCHEDULE OF WAGES and RULES AND REGULATIONS for Firemen, Hostlers and Outside Hostler Helpers.* Article 25(c)(3) provides: "When hired engineers or firemen are laid off on account of reduction in service, they will retain all seniority rights; provided, they return to actual service within thirty (30) days from the date their services are required."

[5] N.C.G.S. 1-593 provides: "The time within which an act is to be done, as provided by law, shall be computed by excluding the first and including the last day. If the last day is Saturday, Sunday or a legal holiday, it must be excluded."

the federal practice. *In re Schmidt,* 54 F. Supp. 262 (D.C. Neb. 1944); See Fed. R. Civ. P. (6).

Walker reported for work on May 29, 1957. It is adjudged that this was the last day of the 30-day period within which he was required to report. Southern's forfeiture of his seniority as of May 28, 1957, was, therefore, unlawful and constituted a violation of his contract.

Under North Carolina law the measure of damages for wrongful discharge from employment is the actual damage sustained on account of the breach.[6] "The maximum amount recoverable is the difference, if any, between the agreed compensation and the amount the employee earned or by reasonable effort could earn during the contract period." *Thomas* v. *College,* 248 N.C. 609, 104 S.E. 2d 175 (1958).

"Back pay" is a proper element of the measure of damages in actions for breach of contract of railroad employment. *Mackey* v. *Union Terminal Co.,* 321 F. 2d 901 (5th Cir. 1963); *Air Line Dispatchers Association* v. *California Eastern Airways,* 127 F. Supp. 521 (D.C. Calif. 1954); *Cook* v. *Des Moines Union Ry. Co.,* 16 F. Supp. 810 (S.D. Iowa 1936). But Walker has no contractual basis for claiming lost wages as damages *beyond* the date of this judgment. *Shiels* v. *Baltimore & Ohio R. R. Co.,* 154 F. Supp. 917, 926 (S.D. Ind. 1957).

Moreover, Walker had the duty to mitigate damages, or, put more accurately, his damages are limited to the extent he could have reasonably mitigated them and failed to do so.

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[6] No evidence was offered at the trial bearing upon measure of damages. Sometimes employment contracts provide severance pay in event of discharge. Exhibit D has no such provision, nor does it even disclose the duration of the employment contract—itself a damage limitation. See: *Marranzano* v. *Biggs,* 213 F. 2d 196 (D.C. Cir. 1954): *Enterprise Wheel & Car Corp.* v. *United Steelworkers of America,* 269 F. 2d 327 (4th Cir. 1959).

That is, one injured by the breach will be allowed to recover from the other party only such damages as he could not with reasonable effort have avoided. *Troitino* v. *Goodman*, 225 N.C. 406, 35 S.E. 2d 277 (1945).

When Walker was discharged in 1957, he was 52 years old and had been working for the railroad about thirteen years. The most he had ever earned was $3,321.74 in 1956. In 1955 he earned $2,291.60, in 1954 $1,040.88, in 1953 $1,356.24, in 1952 $2,803.69, in 1951 $856.94, and in 1950 $551.24. The years prior to that follow a similar income pattern.

It is not easy to seek new employment at the age of 52, but it is not impossible to do it successfully. No evidence was offered in the trial of this case tending to show that Walker made the effort. Walker's appearance and personality is pleasing. He does not appear to be sick, and no evidence was offered tending to show that he has been so ill as to be unable to work since 1957. In my judgment, Walker could have successfully sought other employment and have earned a minimum of approximately $50.00 a week, or $2,400.00 per annum. It is doubtful, in view of his work record, that he would have earned substantially more than that amount had he been permitted to continue in his employment with Southern Railway. But the last year (1956) is much more significant than the prior ones. Considering the average income, but weighting the average heavily in favor of the last full year (1956), I draw the inference and find as a fact that but for his wrongful discharge Walker would have earned approximately $3,000.00 per annum as a fireman for the Southern Railway from date of discharge until now. It has now been more than seven and less than eight years since his discharge, and he has lost approximately $600.00 per year. I find that Walker has

been damaged in the amount of $4,500.00 by reason of wrongful termination of his employment.[7]

There is no evidence whatsoever to support the prayer for punitive damages, and the court fails and refuses to find that Walker is entitled to recover punitive damages.

It is adjudged that Walker has been damaged in the total sum of $4,500.00. Judgment will be entered that he have and recover of Southern that amount.

This 16th day of January, 1965.

/s/ .....

J. BRAXTON CRAVEN, JR., *Chief Judge United States District Court For The Western District Of North Carolina*

Judgment dated December 22, 1965

ALBERT V. BRYAN, Circuit Judge:

Roy Walker, a fireman on the Southern Railway Company, may recover damages of $4500 from the railroad, the District Court has held, for terminating his seniority, as a result of which he was not allowed to work. The assessment was based on the finding that it was a discharge in violation of the collective bargaining agreement between the railroad and his union. Both Walker and Southern appeal.

The facts are simple. Reporting for work on March 3, 1957 Walker found he had been displaced in his job by a fireman with superior seniority. Whereupon he told the crew clerk he was sick and was going home. According to his testimony he kept the officials apprised of his continued

[7] It is unnecessary to decide whether lost fringe benefits, e.g., retirement and disability compensation, etc., should be considered as damage elements for the reason that no evidence was offered to show the value of same, nor even to show that such benefits were lost.

illness and inability to work. On April 29, 1957 the railroad wrote him that "you stand for work on your seniority and unless you protect your seniority within 30 days from the date of this letter, you will have forfeited your seniority". Authority for the 30-day stipulation was the collective bargaining agreement. As of May 28, 1957 at midnight the Southern cancelled his seniority, holding ineffective—as a day beyond the 30 days—his appearance on May 29 to preserve his seniority. However, the Court upheld Walker's contention that a correct counting of the 30 days gave him until May 29 to prevent the forfeiture.

The railroad now contends that the District Court was without jurisdiction because the complainant had not first exhausted the grievance procedures provided in the collective bargaining agreement and the privilege of a review by the National Railroad Adjustment Board under the Railway Labor Act, 45 USC 151, 153(i). The employee assigns as error mitigation by the Court of his damages, saying there was no evidence disclosing other earning opportunities open to him after leaving the Southern.

We must sustain the railroad's appeal. At the time of the District Court's decision the law clearly permitted an immediate suit by a discharged employee against his railroad for a breach of the collective agreement when, as here, the employee asked money damages only and not reinstatement. *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 US 653 (1953); *Slocum* v. *Delaware, L. & W. RR.*, 339 US 239 (1950); *Moore* v. *Illinois Central RR.*, 312 US 630 (1941). But closely following the entry of judgment in this action, the Supreme Court decided *Republic Steel Corp.* v. *Maddox*, 379 US 650 (1965). Although that case did not deal with a railroad employee, nevertheless we read the opinion as requiring in our case an exhaustion of remedies both under the collective bargaining agreement and before the Adjustment

Board prior to suit. Cf. *Neal* v. *System Board of Adjustment*, 349 F2d 722, 727 (8 Cir. 1965).

Specifically, *Maddox* denied judicial recourse to the discharged employee until he had "attempt[ed] use of the *contract* grievance procedure agreed upon by employer and union as the mode of redress." (Accent added.) True, the opinion observed that the Court did not mean to overrule *Moore* v. *Illinois Central RR., supra*, 312 US 630 "within the field of the Railway Labor Act", 379 US at 657, fn. 14; but the ratio decidendi embraces the instant controversy.

The next question, presently, is whether the influence of *Maddox* also compels the railroad employee to take advantage of a review by the Railroad Adjustment Board. There the question was, of course, not expressly before the Court, but it is before us if Walker is to be saved from further court litigation. On the basis of the *Maddox* decision we hold that, if the employee does not prevail on the contract remedies, then before instituting a lawsuit he must petition review by the National Railroad Adjustment Board. 45 USC 153(i). See *Beebe* v. *Union RR.*, 208 A2d 16 (Pa. Super. Ct. 1965).

The Board was obviously created to answer just the type of complaint now before us. The admonishment of the Railway Labor Act, *supra*, 45 USC 152 that "[I]t shall be the duty of all carriers . . . and employees to exert every reasonable effort . . . to settle all disputes, . . . arising out of the application of . . . agreements" warrants the demand that such differences be first submitted to the very agency erected to resolve them. Cf. *Brotherhood of RR Trainmen* v. *Chicago R. & I. RR*, 353 US 30, 34-39 (1956); *Gunther* v. *San Diego & A.E. Ry.*, 34 U.S.L. Week 4058 (U.S. Dec. 8, 1965).

The imposition of this condition was, seemingly, foreshadowed by *Pennsylvania RR* v. *Day*, 360 US 548 (1959),

where the Court held that the Railroad Adjustment Board had exclusive primary jurisdiction over a retired railroad employee's complaint arising under a collective bargaining agreement. This is the trend of relevant Federal decisional law: that disputes rooted in a collective bargaining agreement should be brought to the Board for resolution before resort to the courts. National uniformity in decision and expertness in understanding the problems are among the advantages urging the preference. *Union Pacific RR* v. *Price*, 360 US 601 (1959); see also *Gainey* v. *Brotherhood of Railway & Steamship Clerks*, 275 F2d 342, 343 (3 Cir. 1960).

The need and place of the Board are pointedly exampled now. The rightfulness of Walter's discharge depends upon the method of calculating the time stipulated by the collective agreement within which he had to "return to active service" to avoid forfeiture of seniority. According to his computation his return was punctual, under the railroad's reckoning he was too late. Thus not only is there a need for uniformity in interpretation here, but the determination of the controversy calls for railroad-labor knowledgeability, something possessed in the highest degree by the Adjustment Board. See *Gunther* v. *San Diego & A.E. Ry.*, *supra*, 34 U.S.L. Week 4058 (Dec. 8, 1965).

Letters in the record reveal that the railroad asked the attitude of the union upon the railroad's action in respect to Walker. In response the union expressed approval and suggested that "the matter rest as it is". From this, counsel for Walker argues that remand of his claim to the contract grievance processes would be unfair, since it has thus already been rejected by both the railroad and the union, who are responsible for and supervise the prosecution of these remedies. Notwithstanding, we cannot anticipate that the union will not fulfill any obligation it may have under the

duty of fair representation owed to Walker under the collective bargaining agreement. At all events, Walker should give the union an "opportunity to act on his behalf." *Republic Steel Corp.* v. *Maddox, supra,* 379 US at 653.

"If the union refuses to press or only perfunctorily presses the individual's claim," he has his remedies as the Court intimates in *Maddox,* 379 US at 652. Among others, he may himself follow through on the intramural steps and the Adjustment Board review just discussed. 45 USC 153(i); but cf. *Wade* v. *Southern Pacific Co.,* 243 F Supp. 307 (S.D. Texas 1965). If the time limitations of the internal remedies are interposed to preclude a hearing, the fairness of their application could also be tested before the Board.

Consequently, the judgment on appeal should be vacated and the action returned to the District Court for dismissal. Each party will bear his and its costs here.

Vacated and remanded for dismissal.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

ROY WALKER, *Petitioner,*

v.

SOUTHERN RAILWAY COMPANY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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April 12, 1966

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, which is reported at 354 F.2d 950 (1965), is printed at pages 7-11 of the Appendix to the Petition. The opinion of the United States District Court, which is reported at 237 F. Supp. 278 (1965), is printed at pages 1-7 of the Appendix to the Petition.

QUESTION PRESENTED

Whether in a suit for breach of a collective bargaining agreement under the Railway Labor Act, federal laws governs the question whether a plaintiff must exhaust his contractual and administrative remedies before commencing the suit?

STATEMENT

From 1944 until March 3, 1957, petitioner worked intermittently as a fireman for respondent. During the period of petitioner's employment, he and respondent's other firemen were represented by the Brotherhood of Locomotive Firemen and Enginemen, a labor union. The terms and conditions of petitioner's employment were governed by the provisions of the collective bargaining agreement between the said union and respondent. Petitioner has conceded that his cause of action in this proceeding is based exclusively on the said collective bargaining agreement, and that he has no common law contract. Tr. 135.

On March 3, 1957, petitioner was displaced on his job by another fireman because of the latter's higher seniority. Under the collective bargaining agreement, when an employee is displaced for this reason, he is required within six days "to place himself" in employment to which his seniority entitles him. Tr. 103. When petitioner was displaced on March 3, 1957, he could have "placed himself" in employment by "marking up" for the so-called "extra board." Tr. 41, 43-4. Petitioner did not do this even though it would only have entailed advising a clerk in respondent's local office to place petitioner's name on the extra board. Tr. 43, 44. Instead, when petitioner left the respondent's premises on March 3, 1957, he simply stated to a

crew clerk that he was sick and was going home. Tr. 43. Petitioner did not advise any of his superiors that he was going home or that he was sick. Tr. 43.

Having had no indication on or after March 3, 1957, that petitioner desired to continue in the employ of respondent (Tr. 98-100), on April 29, 1957, respondent's division superintendent wrote the following letter to petitioner:

> "I understand you were displaced from a regular job at Air Line Junction, March 3, 1957 and have idled yourself since.
>
> "This is to advise you that you stand for work on your seniority and unless you protect your seniority standing within 30 days from the date of this letter, you will have forfeited your seniority." D.Ex. 1[1]

A copy of this letter was simultaneously forwarded to petitioner's local union representative, and the letter itself was delivered to petitioner's home the following day. Petitioner actually saw the letter two days later.

As of midnight on May 28, 1957, petitioner had failed to protect his seniority and respondent accordingly treated it as having been forfeited. A letter to this effect was mailed from Greenville, South Carolina. on May 30, 1957, to petitioner by respondent's superintendent. D.Ex. 3. On the preceding day, May 29, 1957, petitioner had appeared at respondent's office in Charlotte, North Carolina, seeking to protect his

---

[1] Art. 25(e)(3) of the applicable collective bargaining agreement provided:

> "When hired engineers or firemen are laid off on account of reduction in service, they will retain all seniority rights; provided, they return to actual service within thirty (30) days from the date their services are required."

seniority, but was advised that it had been terminated at midnight on May 28, 1957, by reason of his prior inaction.

Petitioner then complained to the Brotherhood of Locomotive Firemen and Enginemen about the loss of his seniority. Tr. 40, 53-5. Petitioner concedes, however, that he neither pursued the contractual grievance procedure to its conclusion or attempted to have the matter considered by the National Railroad Adjustment Board. Tr. 81-4, 118. It is, therefore, plain that petitioner did not exhaust his contractual or administrative remedies.

Instead, more than six years after the termination of his seniority, petitioner instituted this suit to recover damages for breach of contract and reinstatement. The portion of petitioner's complaint seeking reinstatement was dismissed by order of the lower court on July 16, 1964, as a result of voluntary abandonment of it by petitioner.

The District Court awarded petitioner damages in the sum of $4,500. The Court of Appeals reversed the District Court's decision and ordered that the complaint be dismissed on the ground that the rationale of this Court's decision in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965) was applicable to suits on collective bargaining agreements under the Railway Labor Act.

REASONS FOR DENYING THE WRIT

The decision of the court below is a clearly correct application of the rationale of *Maddox*. Indeed, in the face of *Maddox*, the court below could hardly have reached any other result.

This court ruled in *Maddox* that state law was inapplicable to the question of whether Maddox should

have exhausted his contractual remedies before instuting a breach-of-contract suit under a collective bargaining agreement covered by the Labor Management Relations Act. The court held that, instead, the general rule in cases to which federal law applies should govern. That rule requires exhaustion of contractual or administrative remedies before the institution of a lawsuit.

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress . . . . unless the contract provides otherwise [footnote omitted], there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant." 379 U.S. 652-3.

It is plain from the discussion in *Maddox* of *Slocum*,[2] *Moore*,[3] and *Koppal*,[4] that those cases no longer support the proposition that state law governs the question of whether an employee suing for breach of a contract covered by the Railway Labor Act must first exhaust his remedies under the contract. In *Maddox*, the issue was whether following an employee's discharge, his suit for severance pay under a collective bargaining agreement covered by the Labor Management Relations Act should be barred by his failure to exhaust con-

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[2] Slocum v. Delaware L.&W. R.R., 339 U.S. 239 (1950).

[3] Moore v. Illinois Central R.R., 312 U.S. 630 (1941).

[4] Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653 (1953).

tractual remedies. The employer argued that federal law applied, and that under it the suit was barred. *Maddox,* on the other hand, urged that the decisions in *Moore* and *Koppal* warranted an exception to application of federal law.

Although in *Moore* and *Koppal* this Court had held that the Railway Labor Act did not bar suits for damages for wrongful discharge because of failure to exhaust administrative remedies, and that state law governed this question, the Court rejected Maddox's argument. The Court said:

> "Federal jurisdiction in both *Moore* and *Koppal* was based on diversity; federal law was not thought to apply merely by reason of the fact that the collective bargaining agreements were subject to the Railway Labor Act. Since that time the Court has made it clear that substantive federal law applies to suits on collective bargaining agreements covered by § 204 of the Railway Labor Act, *International Assn. of Machinists* v. *Central Airlines, Inc.,* 372 U.S. 682, and by § 301(a) of the LMRA, [Labor Management Relations Act] *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448. *Thus a major underpinning for the continued validity of the* Moore *case in the field of the Railway Labor Act, and more importantly in the present context, for the extension of its rationale to suits under § 301(a) of the LMRA, has been removed.*" 379 U.S. 655 (Emphasis added.)

Even without the above-quoted italicized language, it is inconceivable that the rule established by *Moore* and *Koppal* could survive the decision in *Maddox.* Once the Court held in *Maddox* that state law had no application to exhaustion of remedies questions in breach-of-contract cases arising under the Labor Management Relations Act, *Moore* and *Koppal* were drained of all

vitality. The reason is that the Court's decision in *Maddox* was bottomed on its earlier decision in *Lincoln Mills, supra,* holding that substantive federal law governed suits on collective bargaining agreements under the Labor Management Relations Act. Since *International Ass'n of Machinists* v. *Central Airlines,* 372 U.S. 682 (1963), had also established that substantive federal law applied to suits on collective bargaining agreements covered by the Railway Labor Act, it follows that the rationale of *Maddox* overruled *Moore* and *Koppal.*

In *Central Airlines,* the issue was whether a suit to enforce an arbitration award by a System Board of Adjustment could be brought in a federal district court in the absence of diversity of citizenship. The lower courts had held in the negative. This Court reversed, holding that substantive federal law governed and that therefore federal jurisdiction existed without any need for diversity.

The major policy consideration expressed in *Central Airlines* was the need for uniformity in the resolution of questions arising under contracts covered by the Railway Labor Act. The Court also adverted to the Congressional desire for resolution of disputes arising under collective bargaining agreements without strikes.[5]

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[5] This was, of course, the reason for the establishment by Congress in 1934 of the National Railroad Board of Adjustment under Title I of the Railway Labor Act and for the provision in Title II requiring air carriers and unions to establish System Boards of Adjustment. Under the scheme of the Act, disputes as to the interpretation or application of airline or railroad collective bargaining agreements are ultimately settled through arbitration by either the National Railroad Board of Adjustment or, in the case of the airlines, by a System Board of Adjustment. Strikes are not permitted in connection with such disputes.

Although the issue in *Central Airlines* arose under Title II of the Railway Labor Act because the defendant was an airline, the rationale of the decision is equally applicable to Title I which covers collective bargaining agreements entered into by railroads. There is no difference between Title I and Title II of the Railway Labor Act which would warrant any other conclusion. Indeed, both titles establish essentially the same rights and obligations with respect to the carriers and unions covered by each.

Thus, if, as the Court said in *Maddox,* application of state law to the question of exhaustion of remedies in contract suits arising under the Labor Management Relations Act is "incompatible with the precepts of *Lincoln Mills* and cannot be accepted" (379 U.S. 656), it would be equally incompatible with the precepts of *Central Airlines* to apply state law to the question of exhaustion of remedies in contract suits arising under the Railway Labor Act.[6]

Although, as the Court pointed out in *Maddox,*[7] the decision in *Moore* was based in part on the use of permissive, rather than mandatory, language in the

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[6] Other federal courts also apparently regard the rationale of *Maddox* as applicable to cases arising under the Railway Labor Act. Neal v. System Board of Adjustment, 348 F.2d 722, 727 (8th Cir. 1965); Wade v. Southern Pacific Co., 243 F.Supp. 307, 312 (D. Tex. 1965); Railway Workers Employment Council v. B.&O. R.R., —— F.Supp. ——, 52 CCH Lab. Cases 23,596, 23,598-9 (S.D.N.Y. 1965); see also Beebe v. Union R.R., 208 A.2d 16 (1965). These decisions appear to share the view expressed by Mr. Justice Black in his dissent in *Maddox,* that *Moore* and *Koppal* had, as a practical matter, been overruled. See 379 U.S. 667. It does not appear that any federal court has held to the contrary. But cf. in re Certain Carriers, 53 CCH Lab. Cases 16,533 (D.C.D.C. 1966).

[7] 379 U.S. 654.

Railway Labor Act with respect to referral of contract interpretation disputes to the National Railroad Adjustment Board, this has no bearing on the present issue. For the permissive language of the Act was germane in *Moore* only in the context of a belief that substantive state law could govern suits on contracts covered by the Railway Labor Act. In that context, it was pertinent to consider whether anything in the language of the Act itself overrode state law on the issue of exhaustion of remedies. However, now that it has been established that state law is inapplicable—and this is inescapably the effect of *Maddox*—the federal rule with respect to exhaustion applies.[8] And federal law, as enunciated in *Maddox*, plainly requires exhaustion at least with respect to contractual remedies,[8] and unless tenuous distinctions are to be drawn, with respect to National Railroad Adjustment Board remedies as well.

Moreover, referral of contract interpretation disputes to compulsory arbitration is permissive only in the sense that neither a railroad, an airline or a union is compelled to refer every dispute to an Adjustment Board. They may, of course, resolve any dispute short of that step. But, as a practical matter, any unresolved dispute must be submitted to an adjustment board since there is no other way in which it can be resolved. Unions cannot lawfully strike over such disputes, and they are not likely to accede to the railroad or airline without exhausting their statutory right to arbitration.

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[8] This alone is fatal to the petitioner in this case since he conceded that he neither exhausted his contractual remedies nor attempted to proceed before the National Railroad Adjustment Board.

The cardinal policy considerations which impelled the conclusion reached in *Maddox* with regard to exhaustion of contractual remedies are no less pertinent to cases arising under the Railway Labor Act. Thus, the Court could have been speaking of either that Act or the Labor Management Relations Act when it said:

> "Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.
>
> "A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a law suit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'" 379 U.S. 653.

One of the theoretical reasons for permitting common law actions for wrongful discharge without ex-

haustion of contractual or administrative remedies is that such an action does not involve questions of future relations between the railroad and its other employees, or that if it does, the decision will not constitute a binding precedent. *Cf. Slocum* v. *Delaware L.&W. R.R.*, 339 U.S. 239, 244 (1950).

Yet this is not at all the case here. In the instant case, the question of whether the termination of petitioner's employment was wrongful turns entirely on interpretation of the 30-day provision contained in Article 25(e)(3) of the collective bargaining agreement. The question is how, in the context of the railroad industry, time is to be computed under such a provision. Specifically, should the first day of such a period be included and the last excluded, or should the first day be excluded and the last included? Tr. 85-90. Or might there be still another proper interpretation of this provision as applied to the facts here? There cannot be the slightest doubt that the resolution of such questions would have a significant effect on future relations between the railroad and its other employees.[9] It is likewise idle to suppose that a court decision on such questions would not be regarded as a compelling precedent.

Apart from this, there is even more justification here for application of the federal rule requiring exhaustion. In this case, the understanding and custom of the industry were of paramount importance to a proper construction of the somewhat unusual language employed in the collective bargaining agreement (Tr.

[9] Indeed, the resolution of such questions could lead to a demand by either the railroad or the union for a modification of the language of the collective bargaining agreement.

96-8, 114-8, 131-4), and in the correspondence between respondent's superintendent and petitioner. Tr. 71-7, 88-90. It is obvious that if the case had reached it, the National Railroad Adjustment Board would have been particularly well qualified to pass upon the questions involved. Even the District Court below recognized that the railroad jargon was unusual and that the Board served an important purpose in this regard Tr. 88-90, 133-4. See also *Slocum* v. *Delaware L. & W. R.R., supra.*[10] In such a case there is just as much, if not more, reason for requiring exhaustion of remedies than there was in *Maddox* on the issue of severance pay.

In footnote 14 of the decision in *Maddox,* the Court said:

> "By refusing to extend *Moore* v. *Illinois Central R. Co.,* to § 301 suits, we do not mean to overrule it within the field of the Railway Labor Act. Consideration of such action should properly await a case presented under the Railway Labor Act in which the various distinctive features of the administrative remedies provided by that Act can be appraised in context, *e.g.,* the make-up of the Adjustment Board, the scope of review from monetary awards, and the ability of the Board to give the same remedies as could be obtained by court suit." 379 U.S. 657.

The administrative procedures and remedies provided by the Railway Labor Act are essentially the

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[10] In that case the Court said:

> "The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. [Footnote omitted.] Long and varied experiences have added to the Board's initial qualifications." 339 U.S. 243.

same as those under any collective bargaining agreement which establishes arbitration as the means of resolving disputes about interpretation or application of the agreement.[11] The make-up of the Adjustment Board, in the final analysis, is equivalent to any tripartite arbitration tribunal with the power of decision left to an impartial referee.[12]

Finally, it is not open to dispute that the Adjustment Board can give at least the same remedies as could be obtained by a court suit. Indeed, no express limitation is imposed by the Act on the type of remedy which may be ordered by an Adjustment Board, and money awards are expressly provided for in Section 3, First

[11] Sections 3, First (i), (j), (k), (l), (m), (n) and (o) of the Act, in describing the procedures of the Adjustment Board, reveal nothing which differs significantly from routine labor arbitration procedures. 48 Stat. 1189, 1191-92 (1934); 45 U.S.C. § 153 (1965).

[12] Section 3, First (l) of the Railway Labor Act provides:

"Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees." 48 Stat. 1189, 1191 (1934); 45 U.S.C. § 153 (1965).

(o) of the Act. 48 Stat. 1189, 1192 (1934); 45 U.S.C. § 153 (1965). If anything, an Adjustment Board may grant an even broader remedy than a court. For the Adjustment Board has exclusive primary jurisdiction in any breach-of-contract case in which an employee seeks reinstatement. *Cf. Slocum* v. *Delaware L. & W. R.R.*, 339 U.S. 239 (1950); *Moore* v. *Illinois Central R.R.*, 312 U.S. 630 (1941).

CONCLUSION

In view of the foregoing, it is respectfully submitted that the petition for certiorari should be denied. In the alternative, if the Court feels constrained by the language of footnote 14 in *Maddox* to grant the petition, the decision of the Court below should be summarily affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term 1966

No. 89

ROY WALKER,

Petitioner,

v.

SOUTHERN RAILWAY COMPANY,

Respondent.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The Opinion of the District Court for the Western District of North Carolina is reported in 237 F. Supp. 278, (January 16, 1965).

The Opinion of the Court of Appeals for the Fourth Circuit is reported in 354 F. 2d. 950 (1965).

JURISDICTION

The Judgment of The Court of Appeals was entered on the 22nd day of December, 1965, (R.P. 69-74).

The Petition for a Writ of Certiorari was filed on the

17th day of March, 1966, and granted on the 2nd day of May, 1966; ..... U.S. ..... 86 Sup. Ct. 1447, 16 L. ed. (2d) 530, (1966), (R.P. 76).

The Jurisdiction of This Court rests upon Title 28 U.S.C. Section 1254 (1).

STATUTES, RULES AND REGULATIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT VII—CIVIL TRIALS

In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

29 U.S.C. §182. Exemption of Railway Labor Act from subchapter—The provisions of this subchapter shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

45 U.S.C. §151 (a) General Purposes—The purposes of this chapter are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation

or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. §153 (a) National Railroad Adjustment Board Establishment; composition; powers and duties; divisions; hearings and awards—That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

45 U.S.C. §153 (h)—The said Adjustment Board shall be composed of four divisions whose proceedings shall be independent of one another, and the said division as well as the number of their members shall be as follows:

First divisions: To Have jurisdiction over disputes involving train and yard-service employees of carriers; that is, engineers, firemen, hostlers and outside hostler helpers, conductors, trainmen and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

45 U.S.C. §153 (i)—The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate

division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

QUESTIONS PRESENTED

1. Did Petitioner Roy Walker have a right to bring suit against the Southern Railway Company for his wrongful discharge on May 28, 1957, when he asked for money damages only and when he had not first pursued any administrative remedy under the contract and no petition for review had been filed with the National Railroad Adjustment Board?

2. If Petitioner Roy Walker had such a right, did the District Court, on January 18, 1965, have a right to enter Judgment in his favor when he had not first pursued any administrative remedy under the contract and no petition for review had been filed with the National Railroad Adjustment Board?

3. If Petitioner Roy Walker had a right to bring the suit, and if the District Court had a right to enter Judgment for him on January 18, 1965, then, did the opinion of This Court in *Republic Steel Corporation* v. *Maddox,* 379 U.S. 650, 85 Sup. Ct. 614, 13 L. ed. (2d) 580 (1965) which was dated January 25, 1965, (eight days after the opinion of the District Court in the instant case) destroy Petitioner Roy Walker's right to sue the Southern Railway Company and the District Court's right to enter Judgment for him?

4. Should the holding in *Republic Steel Corporation* v. *Maddox* be extended to suits under the Railway Labor Act when the Labor Management Relations Act; under which *Maddox* was decided, specifically states that it does not apply to actions under the Railway Labor Act (Title 29 U.S.C.A., section 182)?

5. Should the holding in *Republic Steel Corporation* v. *Maddox* be extended to the instant case when *Maddox* was a suit for severance pay and the instant case is one for money damages by reason of wrongful discharge?

6. Do the administrative remedies under the contract and the procedure provided by the Railway Labor Act secure to a wrongfully discharged employee the same remedies he can obtain by bringing suit at law for wrongful discharge?

7. Is an employee, against whom a decision is rendered by the National Railroad Adjustment Board, deprived of his right to trial by jury and denied the equal protection of the laws when:

(a) Decisions of the National Railroad Adjustment Board which are favorable to the employee may be appealed to the courts and a trial de novo had, and when:

(b) Decisions which are favorable to the carrier may not be appealed by the employee except to show clear prejudice or a denial of procedural due process?

8. Does the opinion of This Court in *Republic Steel Corporation* v. *Maddox* require that Federal Law and not State Law be applied to all suits by railroad employees for wrongful discharge when those suits ask for money damages only?

STATEMENT

Petitioner Roy Walker was discharged by Respondent Southern Railway Company on May 28, 1957, (R.P. 68). He later brought suit in the Superior Court of Rutherford County, North Carolina, alleging wrongful discharge. Respondent Southern Railway Company filed a petition to

remove the case to the United States District Court for the Western District of North Carolina on the grounds of the amount involved and diversity of citizenship. The motion was granted and the cause removed to the District Court for the Western District of North Carolina.

Shortly thereafter, at a pre-trial conference, Petitioner voluntarily dismissed that part of his complaint in which he asked for reinstatement (R.P. 21, 22, & 39) in addition to monetary damages, thus leaving only a suit against Respondent Southern Railway Company for money damages by reason of his wrongful discharge.

The cause came on for trial without a jury before Craven, Chief Judge.

At the trial it was stipulated that Petitioner Roy Walker had not exhausted his administrative remedies or filed any petition with the National Railroad Adjustment Board before bringing suit for wrongful discharge, (R.P. 46, 47, & 48).

As the trial progressed Petitioner Roy Walker's evidence showed that he had been employed by Respondent Southern Railway Company from the early 1940's until May 28, 1957, (R.P. 2). The evidence further showed that Petitioner Roy Walker was informed by a crew clerk on March 3, 1957, that he had been "rolled for a regular job," (R.P. 21 & 40). This, in railroad parlance, meant that a man with greater seniority had taken over his job.

At the time he received this notice Petitioner Roy Walker was sick and he told the crew clerk he was sick. He later caused a call to be made to the yardmaster telling him that he was sick and could not work and obtained a doctor's certificate from Dr. T. R. Harris to the effect that he was unable to work and sent it to Mr. Edward R. Brinkley, Southern Railway Company Terminal Trainmaster, on May 11, 1957, (R.P. 3). Petitioner Roy Walker had previously

seen Mr. Brinkley about April 9, 1957, and told him that because of an operation and adhesions he was unable to work, (R.P. 4).

On April 29, 1957, a letter was sent, certified mail, by Respondent Southern Railway Company's Superintendent to Mr. Walker and was signed for by Petitioner Walker's daughter on April 30, 1957, (R.P. 5, 6, & 9). This letter advised Petitioner Walker to protect his seniority within thirty days from the date of that letter or he would forfeit it. Accordingly, Petitioner Roy Walker reported to Charlotte on the 29th day of May, 1957, about eleven o'clock a.m., in order to protect his seniority, (R.P. 8). When Petitioner Walker arrived he was shown a message pinned to the Call Book stating that he would not be allowed to work under any circumstances, that he had forfeited his seniority at midnight on May 28, 1957, (R.P. 10). This was authorized and signed by J. R. Brosnan, Division Superintendent. Petitioner Roy Walker then went to Greenville, South Carolina, to try to explain to Mr. Brosnan that he was sick but Mr. Brosnan refused to give him any consideration and informed him that he was discharged, (R.P. 68). Petitioner Walker contended that he had protected his seniority within the time alloted and Southern Railway Company contended that in order to protect his seniority he should have reported by midnight May 28, 1957.

At the trial it was stipulated by Petitioner Roy Walker that he had not exhausted his administrative remedies before commencing suit, (R.P. 46, 47, & 48). Any attempt by Roy Walker to obtain relief through the administrative channels set up under the contract would have failed because his own union wanted him discharged, (see Defendant's Exhibit #3 and #4, which are printed in the Appendix to this brief on pages 1 and 3).

On January 16, 1965, the District Court rendered a de-

cision in favor of Petitioner Roy Walker and granted him damages in the amount of $4500.00.

In reaching this decision the District Court held that Petitioner Roy Walker was not required to exhaust his administrative remedies or file a Petition with the National Railroad Adjustment Board before bringing suit because his rights in this regard were governed by the North Carolina Law and that Law did not require exhaustion of administrative remedies or petition to the National Railroad Adjustment Board before bringing suit when claimant sought only money damages.

The District Court further held that petitioner Roy Walker had protected his seniority by reporting within the thirty days and that his discharge was wrongful.

In rendering Judgment in Petitioner's favor for $4500.00, the District Court ruled that Petitioner Walker would have earned $3,000.00 per year as a fireman for the Respondent Southern Railway Company from the date of his discharge until the time of trial, a little more than seven years. Then, without allegation or proof that Petitioner Walker could have mitigated his damages by seeking and getting other employment, the Court found as a fact that he could have earned $2400.00 per year for seven years, thus reducing the recovery from $3,000.00 per year to $600.00 per year. Petitioner Walker appealed from this portion of the District Court's Judgment but the United States Court of Appeals for the Fourth Circuit, did not consider the question because it held that Petitioner Walker could not sue for any damages until he had exhausted his administrative remedies.

Respondent Southern Railway Company and Petitioner Roy Walker gave notice of appeal to the United States Court of Appeals for the Fourth Circuit, and on January 25, 1965, (eight days after the District Court had entered Judgment in the instant case), this Court decided *Republic*

Steel Corporation v. *Maddox*, 379 U.S. 650, 85 Sup. Ct. 614, 13 L. ed. (2d) 580 (1965).

This case was heard by the United States Court of Appeals for the Fourth Circuit on November 3, 1965 and on December 22, 1965, that Court rendered a decision reversing the District Court, vacating the Judgment, and ordering the case remanded to the District Court for dismissal.

The basis for the decision of the United States Court of Appeals for the Fourth Circuit was their feeling that *Republic Steel Corporation* v. *Maddox* required them to hold that a railroad employee must exhaust his administrative remedies both under the Collective Bargaining Agreement and before The National Railroad Adjustment Board prior to bringing suit for wrongful discharge.

The effect of this decision was to completely preclude suits for wrongful discharge because decisions of The National Railroad Adjustment Board are final and can only be appealed to Court for a trial de novo when The Board renders a money Judgment against a carrier.

The Court of Appeals reached this decision in spite of the fact that This Court in the *Maddox* case specifically stated that ". . . by refusing to extend *Moore* v. *Illinois Central RR Co.* to section 301 suits, we do not mean to overrule it within the field of the Railway Labor Act . . ." (*Republic Steel Corporation* v. *Maddox*, 379 U.S. 650, Page 659, 13 L. ed. (2d) 580, 85 Sup. Ct. 614, Page 619.)

ARGUMENT

At the time Roy Walker, Petitioner herein, was discharged from his employment with the Southern Railway Company, at the time this suit was commenced and at the time Judgment was entered by the District Court for the Western District of North Carolina, the law permitted Roy

Walker to either pursue his administrative remedies or ask the Courts of his country to give him a money-judgment for wrongful discharge. *Moore* v. *Illinois Central R.R. Company,* 312 U.S. 630, 61 S. Ct. 734, 85 L. Ed. 1089 (1941); *Slocum* v. *Delaware L. & W. R.R. Company,* 339 U.S. 239, 70 S. Ct. 577, 94 L. ed. 795 (1950); *Haynes* v. *Winston Salem Southbound Railway Company,* 252 N.C. 391, 113 S.E. (2d) 906, (1960).

Petitioner Roy Walker was entitled to rely on the law as enunciated by the Courts of his country and bring suit for wrongful discharge. The United States District Court for the Western District of North Carolina was entitled to rely on the law as enunciated by the Courts at the time it rendered this judgment. (Eight days before the case of *Republic Steel Corporation* v. *Maddox,* was decided.)

Therefore, even if this Court should decide to change the rule laid down in the *Moore* and *Slocum* cases, *supra,* such a change should not apply to Petitioner Roy Walker in this cause. His rights should be governed by the law as it was enunciated by this Court up to the time judgment was rendered for him in the United States District Court.

We come now to two major points. First, *Republic Steel Corporation* v. *Maddox,* 379 U.S. 650, 13 L. ed. (2d) 580, 85 Sup. Ct. 614 (1965), is not in conflict with the opinion of this Court in the *Moore* and *Slocum* cases because *Maddox* was a suit for severance pay, a specific amount of money set forth in the contract; and, by his suit *Maddox* sought a specific remedy under the contract. He actually asked The Court to require *Republic Steel Corporation* to perform the contract. The responsibility for the enforcement of any demand for performance of the contract was, under the terms of the contract itself, to be handled by administrative procedures.

In both *Moore* and *Slocum, supra,* the employee asked, not for severance pay which amounts to performance of the contract, but for damages arising from its wrongful breach. Thus a careful examination of the decisions show that there is no conflict between the doctrine announced in *Moore* and *Slocum* and the doctrine set forth in *Maddox.*

Second, your Petitioner strongly contends that the doors of the Courts of his country should not be closed to Petitioner Roy Walker when his employer breached the Contract of Employment and wrongfully discharged him. Your Petitioner earnestly urges that in suits for damages arising from breach of Contract the doctrines heretofore enunciated by this Court should stand and the doors of all Courts should be open to all citizens. Your Petitioner respectfully urges that this rule is sound for the following reasons:

1. Under most administrative procedure the employee is at the mercy of the Union and his employer. In the instant case the hostility of the Union to Petitioner Walker and the acquiesence by the Company was the determining factor. (Defendant's Exhibit #3, printed in the Appendix to this Brief on Page 1, is a copy of a letter written by L. G. Tollison, Director of Labor Relations of the Southern Railway Company, to R. L. McCollum which letter showed he had discussed the matter of Roy Walker with R. L. McCollum, General Chairman of the Brotherhood of Locomotive Firemen and Engineers, Roy Walker's Union. The last paragraph of that letter shows that the Company asked the Chairman of Roy Walker's own Union whether or not he wanted Walker rehired. The pertinent portion of the letter is set forth in the last paragraph thereof and reads as follows:

> "In the light of the circumstances related above, will you please advise promptly what your position is with

respect to this matter, i.e., whether Walker has forfeited his seniority because of his failure to report for work in conformity with the Notice served on him by the superintendent, or whether his name should be restored to the seniority roster in view of the evidence he has produced from his doctor that he was under doctor's care during the period in question."

Instead of helping Roy Walker and striving to get the Company to rehire him, the Chairman of his own Union answered the above letter and asked the Company to let his discharge stand. This is shown by a letter denominated Defendant's Exhibit #4, and printed in the Appendix to this Brief on page 3, from R. L. McCollum, Union Chairman, answering the letter of L. G. Tollison, Company Director of Labor Relations. The last paragraph of this letter is the pertinent part and reads as follows:

"Considering the circumstances in this case and the claimant's previous record, it would appear that the best action to take would be to let the matter rest as it is with Fireman Walker's name removed from the Seniority List.

Very truly yours,

(Signed) R. L. McCollum"

It is not difficult to predict what would have happened to Petitioner Roy Walker's claim for wrongful discharge had he elected to follow administrative procedures under the Contract where a hostile Union and a subservient and cooperating Company would be Judge and Jury. Nor would his chances of success have been any greater before The National Railroad Adjustment Board whose thirty-six members are equally divided between the carriers and the

Unions—each group having authority to select eighteen members. This is shown in 45 USCA Section 153 First (a) . . . "that the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of Section 152 of this Title." Roy Walker's case would have been heard before the First Division which is composed of ten members, five of whom are selected by the carriers and five of whom are selected by the Unions. 45 USCA Section 153 (h) reads as follows:

> "The Adjustment Board shall be composed of four divisions, whose procedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows: *First Division:* to have jurisdiction over disputes involving train and yard service employees of carriers; that is, engineers, firemen, hostlers and outside helpers, conductors, trainmen and yardservice employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the National Labor Organizations of the employees."

An individual American employed by a railroad or an airline finds himself in a very precarious position. He has no voice in the establishment of the administrative procedures which he must use in case he is unjustly treated.

Steele v. *Louisville & Nashville R.R. Co.,* 323 U.S. 192, 89 L. ed. 173, 65 Sup. Ct. 226. In this case Mr. Chief Justice Stone says on Page 200 of the U.S.:

> "§ Two, 2d. Requiring carriers to bargain with the representative so chosen operates to exclude any other

> from representing a craft. Virginian R. Company V System Federation, R.E.D. Supra (300 U.S. 545, 81 L.ed. 798, 57 Sup. Ct. 592.) The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining."

He has no voice in the selection of the members of the National Railroad Adjustment Board who will hear his complaint. The union and the company select these men. 45 U.S.C.A. §153, 1st (a) and (h):

He has no right of appeal to an impartial Court if The National Railroad Adjustment Board decides against him but the company has a right to appeal to an impartial court and have a trial de novo if the Board decides against it. *Burke* v. *Union Pacific R.R. Co.,* 129 Fed. 2d 844 (1942) Tenth Circuit. *Reynolds* v. *Denver & Rio Grande Western R.R. Co.,* 174 F. 2d 673. Justice Huxman for the Tenth Circuit, says on Page 676:

> "We conclude that the adjudication by the Board in favor of the railroad company upholding the dismissal of the appellant is final and binding and may not be challenged by the appellant in this proceeding. Coates V St. Louis and San Francisco R.R. Co. 230 Fed 2d. 798; Brotherhood of Railway & Steamship Clerks, Freighthandlers, Express & Station Employees, appellant, V. Atlantic Coastline R.R. 253 F. 2d. 753 (1958) Fourth Circuit."

The Courts, in sustaining this patently unfair procedure, have based their opinions upon the fact that a discharged employee could either sue for wrongful discharge in court or pursue his administrative remedies. This line of reason-

ing is clearly set forth in *Barnette* v. *Pennsylvania Reading Seashore Lines,* 245 F. 2d 579, where Circuit Judge Goodrich of the Third Circuit, says on Page 581:

> "Plaintiff urges, if the statute provides for a review for the carrier when the Board's decision is in favor of the employee, and not for the employee when the decision is in favor of the carrier, then the statute is unconstitutional.
>
> "We do not think either of these propositions is true. Plaintiff suggests that he was forced to take his claim to the Board but, Moore V Illinois Central R.R. Co. (1941) 312 U.S. 630, 61 Sup. Ct. 754, 84 L.ed. 1089, holds to the contrary; see also Slocum V Delaware L. & W R.R. Co. (1953), 319 U.S. 239, 70 Sup. Ct. 577, 94 L.ed. 795. The plaintiff, under authority of the Moore case, could have sued the defendant for money damages for breach of contract, if he won he would be entitled to such damages as flow from the breach.
>
> "If he chooses to press his claim before the Board because of informality of procedure or some other reason, he cannot complain of lack of mutuality since another route for the goal of recovery was open to him. A legislative policy permitting court re-examination of monetary awards but no review in cases where no award is made is not a matter for us to question unless it violates constitutional rights. The statutory scheme does not . . ."

An employee may also find that after having exhausted the administrative remedies under the contract *either* party may petition for review by The National Railroad Adjustment Board. This is clearly stated in the Act 45 U.S.C.A. §153 (i). . . .

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this matter, the disputes may be referred by petition of the parties or by either party (Italics OURS) to the appropriate division of the adjustment board with a full statement of facts and all supporting data bearing on the dispute."

Thus, the company may take him before the National Railroad Adjustment Board whether he wishes to go or not to go; and, if he loses, the decision is final and he has no right of appeal. He cannot thereafter bring suit in court. So, when Respondent insists that Petitioner was required to exhaust his administrative remedies before suit, it is actually asking this Court to hold that Petitioner has no right to sue Respondent. That his only remedy is with the company and The National Railroad Adjustment Board. Such a holding would clearly violate Petitioner's constitutional right to trial by jury which is so clearly guaranteed by the Seventh Amendment.

This Court has constantly fueled the torch which lights the way to individual freedom and liberty and opportunity. The light of that torch now shines so brightly that people in every corner of the globe lift their eyes in hope and dream of the day when all nations everywhere will touch their torches to our flame and let them burn until tyranny and bigotry and oppression are consumed by the ever growing fires of freedom.

No tribunal in the history of mankind has done so much

to protect the individual from the overpowering force of government and the unreasoning force of the mob.

Yet, as we progress in science and technology, we move toward a new society which becomes more complex, more powerful and more interdependent with each passing day. As we cross these new frontiers, solve new problems and batter at the very gates of space, new sources of force are born which selfish men, in their ever-expanding thirst for power, will seek to exploit. We must see to it that these new sources of force are not used to create or sustain an economic tyranny which will stifle the progress of free men in our enlightened Twentieth Century.

We have embraced an industrial philosophy which balances the power of organized labor against the power of giant corporations. We are constantly striving to see that this balance creates a stable and free atmosphere where individual dignity and opportunity may flourish and grow. However the struggle between these two giant forces reaches into the halls of our legislative bodies and into the courtrooms of our nation. Both sides possess tremendous financial, intellectual and political power.

Both sides seek at all costs to advance their cause.

Neither side wishes to see the outcome of the struggle placed in the hands of impartial, disinterested, tribunals. Instead, each seeks to create a special type tribunal upon which they hope to be able to impose their wishes.

When, instead of creating an impartial and disinterested tribunal, we create a tribunal equally balanced between these two opposing forces, we make it possible for these forces to cooperate in the crushing of any individual any time such action seems to them expedient.

Congress never intended The National Railroad Adjustment Board to have jurisdiction over wrongful discharge

cases. An employee who treats his discharge as final is no longer a member of the union and is no longer an employee of the carrier. Therefore, the equally balanced National Railroad Adjustment Board has no reason to worry about that employee or his fate because he is of no further use to either of the forces which control that Board.

The purposes of the Act show that this was never the intent of Congress.

45 U.S.C.A. §151 (a) "General Purposes:

> "The purposes of the chapter are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

Nowhere by implication or otherwise do these purposes evidence an intent to give The National Railroad Adjustment Board exclusive jurisdiction in wrongful discharge cases because Congress surely foresaw the danger to the rights of the individual which would follow such a grant of power.

Petitioner Roy Walker respectfully shows to the Court that the years pass swiftly and litigation is lengthy (especially against larger corporation) and he asks The Court to pass on the question of mitigation of damages.

In order to show the extent of his damages, Roy Walker introduced evidence of his past earnings up to the date of his wrongful discharge in 1957.

And the earnings of the employee immediately junior to him in seniority for the years 1957 through 1963.

The trial court found it a fact that Roy Walker would have earned $3,000.00 per year as an employee of the Southern Railway Company, defendant herein, had he not been wrongfully discharged.

At this rate, from the date of his wrongful discharge in May of 1957 until the date of the trial in December of 1964 he would have earned approximately $22,500.00. This Finding of Fact by the Trial Court is supported by competent evidence of Roy Walker's earnings before his discharge.

The Trial Court then found as a fact that Roy Walker could have earned $2,400.00 per year at other employment during this period of time and that therefore he only lost $600.00 per year for seven and one half years giving judgment for Roy Walker in the amount of $4,500.00. This finding of fact is not supported by any evidence and therefore should not be upheld. Once the plaintiff has proved breach of contract and wrongful discharge and has introduced evidence from which the trial court can find the amount he would have earned had he been permitted to continue in his employment then the burden shifts to the defendant who must show matters in mitigation of damages. This burden is on the defendant and it is a burden which he must carry in order to reduce the amount of the recovery. In this case the defendant introduced no evidence as to what Roy Walker was capable of earning and therefore did not carry this burden.

North Carolina clearly holds that when an employee is

wrongfully discharged and offers evidence from which the Court finds as a fact the amount he would have earned had his employment contract not been unlawfully breached that then the burden of proof shifts to the employer and he must prove any matters in mitigation of damages. The North Carolina cases supporting this rule begin in Volume 50 of the North Carolina, *Hendrickson* v. *Anderson,* 50 North Carolina, 246; where Battle, J. says on Page 249:

> "But in a suit for the stipulated compensation the defendant may show in diminution of damages, that after the plaintiff had been dismissed he had engaged in other lucrative business. This, however, must be proved by the defendant, and must not be presumed."

To the same effect is *Smith* v. *Lumber Company,* 142 North Carolina, 26 (1906); *Construction Company* v. *Wright,* 189 N.E. 456, 127 S.E. 580 (1925).

This is also the rule on most of the jurisdiction of the United States including the Federal Court. An excellent annotation on this subject is found in 17 A.L.R. (2d) 968, the point in question being found on Page 978, and I quote:

> "By the overwhelming weight of authority in the United States the burden of proving any benefit that flows to the discharged employee is on the employer in an action for loss of wages. Another way of stating this rule is that prima facie a wrongfully discharged employee is entitled to full for the term of the contract. But, however, variously it may be expressed, the present rule, excepting one jurisdiction, is that the employer must show affirmatively, to reduce damages, that the discharged employee could or did have other earnings subsequent to the wrongful discharge."

Under this statement are cited a number of Federal cases and North Carolina is listed as being in accord.

Respectfully submitted,

J. NAT HAMRICK
216 North Main Street
Runtherfordton, North Carolina

FRED D. HAMRICK
201-202 Rutherfordton Drug Building
Rutherfordton, North Carolina

Counsel for Petitioner, Roy Walker

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Defendant's Exhibit No. 3

August 23, 1957

LF-6-W-57

Mr. R. L. McCollum, General Chairman,
Brotherhood of Locomotive Firemen and Enginemen
First National Bank Building
Tuscumbia, Ala.

Dear Sir:

On March 3, 1957, R. E. Walker, who was working as yard fireman on 3:00 p.m. to 11:00 p.m. assignment at Air Line Junction, Charlotte, N. C., was notified that he had been displaced by another fireman through exercise of seniority. Mr. Walker did not then place himself on another assignment, mark up for any other service or request permission to be off, but simply elected to absent himself without proper leave.

When the matter was brought to the attention of Division Superintendent Brosnan, he wrote Walker at his Forest City, N. C. address on April 29, 1957, advising him that he stood for work and that unless he protected his seniority standing within thirty days from April 29, he would forfeit his seniority. Receipt of the letter was acknowledged on April 30 on the prescribed post office form, the letter having been sent by certified mail.

On May 29, at 2:45 p.m., Walker reported to the yard office at Charlotte, but was not permitted to mark up, inasmuch as he had not complied with the Superintendent's notice to report within thirty days from April 29.

On May 30, Mr. Brosnan again wrote Walker, referred to the previous letter dated April 29, and advised him that his name had been stricken from the seniority list and that he

was no longer considered an employee of the Southern Railway Company. At 4:30 p.m. that same date, Walker discussed his case with Superintendent Brosnan personally at Greenville, at which time Walker admitted he had failed to protect his seniority within the prescribed time limit. During his discussion with the Superintendent, Walker also indicated he had been off sick and in the hospital for an operation during March and that his daughter had reported this to the Company by long distance telephone call; however, the Superintendent's staff advises they have no record or knowledge of such a call having been received. Mr. Brosnan declined to change his decision in the matter.

On June 24, 1957, the Superintendent received a statement dated June 18, 1957 signed by Dr. T. R. Harris of the Gardner-Webb Community Health Center, Boiling Springs, N. C., copy of which is attached, concerning Walker's physical condition. Your attention is called to the fact that Dr. Harris gives a history which I believe you will agree anyone will interpret as meaning that Walker was unable to work during the period he was off.

In the light of the circumstances related above, will you please advise promptly what your position is with respect to this matter, i.e., whether Walker has forfeited his seniority because of his failure to report for work in conformity with notice served on him by the Superintendent, or whether his name should be restored to the seniority roster in view of the evidence he has produced from his doctor that he was under doctor's care during the period in question.

Very truly yours,

(s) L. G. TOLLESON
Director of Labor Relations

Defendant's Exhibit No. 4

September 16, 1957

Mr. L. G. Tolleson
Director of Labor Relations
Southern Railway System
Washington 13, D. C.

Dear Mr. Tolleson:

Referring further to your letter of August 23, 1957, concerning the seniority of Fireman R. E. Walker, Charlotte Division North. Your File LF-6-W-57.

This matter was discussed with you while in Washington September 11. You requested that I write you concerning my position in this matter. As I explained to you in conference, it does not matter with the Organization whether this man is returned to service or not. However, the record indicates that Fireman Walker was displaced on March 3. After being away from the service approximately 47 days, Superintendent Brosnan notified Mr. Walker that he would be required to return in 30 days or his name would be removed from the seniority list. Mr. Walker did not return within the 30 days and his name was subsequently removed from the list.

It seems Fireman Walker absented himself from service without proper leave and has forfeited his seniority. However, he did produce a doctor's statement that he was under the doctor's care during this time. Regardless of this, it did not prevent him from notifying Superintendent Brosnan at least during the 30 day period he was given to return to service. Article 26 (g) (3) of the firemen's agreement provides, "Firemen, hostlers and outside hostler helpers who voluntarily leave the service will rank as new men if re-

employed." It also seems that any claim Fireman Walker might have is barred from further handling by Article 32 (b) of the Firemen's Agreement. He did not handle his case as therein required with Superintendent Brosnan, nor did he process same to the next ranking officer.

Considering the circumstances in this case and the Claimant's previous record, it would appear that the best action to take would be to let the matter rest as it is with Fireman Walker's name removed from the list.

Very truly yours,

/s/ R. L. McCollum
R. L. McCollum

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ROY WALKER, *Petitioner*

v.

SOUTHERN RAILWAY COMPANY, *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 89

ROY WALKER, *Petitioner*

v.

SOUTHERN RAILWAY COMPANY, *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Does Federal or state law determine whether an employee of a railroad who claims damages from his employer for violation of a collective bargaining agreement must exhaust the remedies provided by the agreement and the Railway Labor Act before seeking judicial redress?

2. Assuming that Federal law applies, does Federal law require exhaustion of contractual (or contractual and administrative) remedies prior to filing suit?

STATEMENT

From 1944 until March 3, 1957, petitioner worked intermittently as a fireman for respondent. During the period of petitioner's employment, he and respondent's other firemen were represented by the Brotherhood of Locomotive Firemen and Enginemen, a labor union. The terms and conditions of petitioner's employment were governed by the provisions of the collective bargaining agreement between the union and respondent. Petitioner has conceded that his cause of action in this proceeding is based exclusively on the collective bargaining agreement and that he had no common law employment contract. R. 67-68.

On March 3, 1957, petitioner was displaced on his job by another fireman because of the latter's higher seniority. Under the collective bargaining agreement, when an employee is displaced for this reason, he is required within six days "to place himself" in employment to which his seniority entitles him. When petitioner was displaced on March 3, 1957, he could have "placed himself" in employment by "marking up" for the so-called "extra board." R. 40. Petitioner did not do this even though it would only have entailed advising a clerk in respondent's local office to place petitioner's name on the extra board. R. 41. Instead, when petitioner left the respondent's premises on March 3, 1957, he simply stated to a crew clerk that he was sick and was going home. R. 40. Petitioner did not advise any of his superiors that he was going home or that he was sick. R. 40-41.

Six weeks passed and respondent still had no indication from petitioner whether he desired to continue in the employ of respondent. Accordingly, on April 29,

1957, respondent's Division Superintendent wrote the following letter to petitioner:

> "I understand you were displaced from a regular job at Air Line Junction, March 3, 1957 and have idled yourself since.
>
> "This is to advise you that you stand for work on your seniority and unless you protect your seniority standing within 30 days from the date of this letter, you will have forfeited your seniority." (D. Ex. 1; R. 5)[1]

A copy of this letter was simultaneously forwarded to petitioner's local union representative, and the letter itself was delivered to petitioner's home the following day. D. Ex. 2; R. 5-6, 43. Petitioner actually saw the letter three or possibly four days after that. R. 41-42.

As of midnight on May 28, 1957, petitioner had failed to protect his seniority and respondent accordingly treated it as having been forfeited. A letter to this effect was mailed from Greenville, South Carolina, to petitioner by respondent's superintendent on May 30, 1957. D. Ex. 3; R. 68. On the preceding day, May 29, 1957, petitioner had appeared at respondent's office in Charlotte, North Carolina, seeking to protect his seniority, but was advised that it had been terminated at midnight on May 28, 1957, by reason of his prior inaction.

Petitioner then complained to the Brotherhood of Locomotive Firemen and Enginemen about the loss of

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[1] Art. 25(e)(3) of the applicable collective bargaining agreement provided:

> "When hired engineers or firemen are laid off on account of reduction in service, they will retain all seniority rights; provided, they return to actual service within thirty (30) days from the date their services are required." (R. 29)

his seniority. Petitioner concedes, however, and the District Court specifically found, that he neither pursued the contractual grievance procedure to its conclusion nor attempted to have the matter considered by the National Railroad Adjustment Board; *i.e.*, that he did not exhaust his contractual or administrative remedies. Pet. Br. 6; R. 22, 46.

On August 23, 1957, notwithstanding petitioner's failure to pursue the grievance procedure, respondent's Director of Labor Relations wrote a letter to the General Chairman of the Brotherhood of Locomotive Firemen and Enginemen, setting forth the salient facts regarding the termination of petitioner's seniority and asked the union's position. Specifically, the union was asked whether, as it interpreted the collective bargaining agreement, petitioner had forfeited his seniority because of failure to report for work in conformity with the notice he received from respondent's Division Superintendent, or whether petitioner's name should be restored to the seniority roster because of the evidence that he had been receiving medical care during the period in question. A copy of this letter, which was defendant's Exhibit No. 4 in the District Court, is reproduced at page A-1 of the Appendix to this brief.

On September 16, 1957, the General Chairman of the union replied. His letter recognized that petitioner's reporting for work on May 29, 1957, did not constitute a return to work within 30 days. The General Chairman stated:

> "Mr. Walker did not return within the 30 days and his name was subsequently removed from the list."

The General Chairman's reply noted that petitioner had not even advised respondent of his situation during the period he was given to return to service. The General Chairman also stated that it appeared that petitioner's claim was barred from further processing under the collective bargaining agreement because petitioner had failed to comply with the requirements of the grievance procedure provision, Article 32(b).

For all of these reasons, the union concurred in the Company's position that petitioner's seniority had properly been terminated. A copy of the General Chairman's letter of September 16, 1957, which was defendant's Exhibit No. 5 in the District Court, is reproduced at page A-3 of the Appendix to this brief; Article 32 of the collective bargaining agreement (R. 33-34) is reproduced at page A-4 of the Appendix.

On August 15, 1963, more than six years after the termination of his seniority, petitioner instituted this suit to recover damages for breach of contract and reinstatement. Petitioner subsequently abandoned his claim for reinstatement, and the District Court accordingly dismissed that portion of his complaint. As for the damage claim, however, the District Court awarded petitioner damages in the amount of $4,500, holding *inter alia* that his failure to exhaust his contractual and administrative remedies did not bar his court action.

The basis for the District Court's holding was this Court's decisions in *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653 (1953), *Slocum* v. *Delaware, L. & W. R. R. Co.*, 339 U.S. 239 (1950), and *Moore* v. *Illinois Central R. R. Co.*, 312 U.S. 630 (1941), holding that state law governs whether failure to ex-

haust contractual and administrative remedies bars an effort to recover damages in court, and the North Carolina Supreme Court's decision in *Haynes* v. *Winston-Salem Southbound Ry. Co.*, 252 N.C. 391, 113 S.E. 2d 906 (1960), holding that North Carolina law does not require exhaustion.

On appeal, the Court of Appeals reversed and ordered dismissal of the complaint on the ground that the rationale of this Court's decision in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965), applied to suits on collective bargaining agreements enforceable under the Railway Labor Act as well as to suits on agreements enforceable under the Labor Management Relations Act. The *Maddox* case, decided after the District Court's opinion in the instant case, held that exhaustion of contract remedies is a prerequisite to suing in court.

SUMMARY OF ARGUMENT

I.

It is now clear that, in an employee suit for breach of a collective bargaining agreement covered by the Railway Labor Act, the rights of the parties are governed by Federal law, not state law. Accordingly, in the instant case, Federal Law governs whether the plaintiff must have exhausted his contractual and administrative remedies before filing suit.

The Federal rule, as announced in *Maddox*, is that an employee suing for violation of a collective bargaining agreement, must first exhaust his other remedies. The *Maddox* decision involved a contract under the Labor Management Relations Act, but there is no basis for declining to extend the rule there announced to suits on contracts covered by the Railway Labor Act.

Earlier decisions of this Court which referred the question of exhaustion of remedies to state law cannot be viewed as authoritative since they were based on the assumption, no longer valid, that state substantive law governed the rights of the parties.

II.

Nothing in the nature of the particular claim asserted here justifies departure from the *Maddox* rule. Nor is there anything in the scheme of the Railway Labor Act that would support the Court's applying a different rule from that followed in contracts subject to the Labor Management Relations Act.

Petitioner's suggestion that he would not get a fair determination of his rights from the National Railroad Adjustment Board is neither supported by evidence nor a basis for declining to apply the general Federal rule laid down in *Maddox*.

The policy reasons favoring exhaustion of remedies in the area covered by the Labor Management Relations Act are equally applicable to the railroad and airline industries. In this connection, the arbitration procedures established by the Railway Labor Act are substantially similar to those provided in the typical collective bargaining agreement subject to the Labor Management Relations Act.

III.

No constitutional objections to the application of *Maddox* are properly before the Court. In any event, contrary to petitioner's insistence, extension of the *Maddox* rule to cases arising out of contracts under the Railway Labor Act would not deny him equal protection of the law or deprive him of a right guaranteed by the Seventh Amendment.

IV.

Nor could there be any possible justification for this Court's extending the *Maddox* rule to employee suits for breach of a collective bargaining agreement covered by the Railway Labor Act while at the same time giving its decision only "prospective" application and declining to apply the rule to the instant controversy.

ARGUMENT

I. The Rationale of the Maddox Decision Clearly Applies to Suits for Breach of Collective Bargaining Agreements Under the Railway Labor Act.

This Court held in *Maddox* that Federal law, not state law, governs whether an employee suing for breach of a collective bargaining agreement under Section 301 of the Labor Management Relations Act must first exhaust his contractual and administrative remedies. The Court rejected the plaintiff's argument that its earlier, inconsistent rulings in *Slocum, Koppal* and *Moore,* involving contracts under the Railway Labor Act, should be followed. The Court stated:

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress. [footnote omitted] . . . [U]nless the contract provides otherwise [footnote omitted], there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant." 379 U.S. at 652-53.

In *Maddox*, the Court expressly refrained from overruling *Slocum, Koppal* and *Moore* to permit future consideration of such action in a case arising under the Railway Labor Act. But both the logic and language of *Maddox* compel the conclusion that, even under the Railway Labor Act, *Slocum; Moore* and *Koppal* can no longer be regarded as stating the applicable law with respect to exhaustion of remedies. As the Court made clear in *Maddox*, the basis for the rule in *Moore* and *Koppal* was the assumption that the sole basis for Federal jurisdiction in those cases was diversity of citizenship and the corollary assumption that the rights of the parties were governed by state law.

Insofar as collective bargaining agreements enforceable under the Labor Management Relations Act are concerned, the notion that state law could govern was laid to rest in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957), which also made clear the responsibility of the Federal courts to fashion a consistent and comprehensive body of case law in implementation of national labor policy. Against this background, the Court in *Maddox* refused to apply the precedent of *Slocum, Moore* and *Koppal* and declared a Federal rule with respect to exhaustion of remedies. That rule requires an employee to exhaust his contractual and administrative remedies before attempting judicially to enforce rights under a collective bargaining agreement.

In declining to follow *Slocum, Moore* and *Koppal*, this Court went further in *Maddox* than merely holding those earlier decisions inapplicable. It intimated serious doubt as to their continued validity even with respect to contracts under the Railway Labor Act. It

pointed out that as *Lincoln Mills* had dispelled the notion that state law governed the rights of parties to contracts under the Labor Management Relations Act, the Court's subsequent decision in *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963), dispelled the notion with respect to contracts under the Railway Labor Act.

As the Court noted—

> "Federal jurisdiction in both *Moore* and *Koppal* was based on diversity; federal law was not thought to apply merely by reason of the fact that the collective bargaining agreements were subject to the Railway Labor Act. Since that time the Court has made it clear that substantive federal law applies to suits on collective bargaining agreements covered by § 204 of the Railway Labor Act, *International Assn. of Machinists* v. *Central Airlines, Inc.* 372 U.S. 682, and by § 301(a) of the LMRA, [Labor Management Relations Act] *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448. *Thus a major underpinning for the continued validity of the* Moore *case in the field of the Railway Labor Act, and more importantly in the present context, for the extension of its rationale to suits under § 301(a) of the LMRA, has been removed.*" 379 U.S. at 655 (Emphasis added.)

In *Central Airlines*, the case that removed the "major underpinning" of *Moore* and *Koppal* in the field of the Railway Labor Act, the issue had been whether a suit to enforce an arbitration award by a system board of adjustment could be brought in a Federal district court in the absence of diversity of citizenship. The lower courts said no. This Court reversed, holding that Federal jurisdiction existed with-

out diversity of citizenship because Federal substantive law governed the rights of the parties.

The major policy consideration expressed in *Central Airlines* was the need for uniformity in the resolution of questions arising under contracts covered by the Railway Labor Act. The Court also adverted to the Congressional desire for resolution of disputes arising under collective bargaining agreements without strikes.[2]

Although the issue in *Central Airlines* arose under Title II of the Railway Labor Act because the defendant was an airline, the rationale of the decision is equally applicable to Title I, which covers collective bargaining agreements entered into by railroads. Both titles establish essentially the same rights and obligations with respect to the carriers and unions covered by each.

In *Maddox,* this Court said that application of state law to the question of exhaustion of remedies in contract suits arising under the Labor Management Relations Act is "incompatible with the precepts of *Lincoln Mills* and cannot be accepted." 379 U.S. at 656. Application of state law to the same question in contract suits arising under the Railway Labor Act would

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[2] This was, of course, the reason for the establishment by Congress in 1934 of the National Railroad Board of Adjustment under Title I of the Railway Labor Act and for the provision in Title II requiring air carriers and unions to establish system boards of adjustment. Under the scheme of the Act, disputes as to the interpretation or application of airline or railroad collective bargaining agreements are ultimately settled through arbitration by either the National Railroad Adjustment Board or, in the case of the airlines, by a system board of adjustment. Strikes are not permitted in connection with such disputes.

be equally incompatible with the precepts of *Central Airlines.*[3]

Although, as the Court indicated in *Maddox,* the decision in *Moore* noted the use of so-called "permissive" language in the Railway Labor Act with respect to referral of contract disputes to the National Railroad Adjustment Board (379 U.S. at 654), use of that language has no significance in this case. The so-called "permissive" language was germane in *Moore* only in the context of a belief that state law could govern suits on contracts covered by the Railway Labor Act.[4] In that context, it was pertinent to consider whether anything in the language of the Act itself specifically superseded state law on the issue of exhaustion of administrative remedies.

But now that *Central Airlines* has established that state law is inapplicable to employee suits for breach of

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[3] Other Federal courts also apparently regard the rationale of Maddox as applicable to cases arising under the Railway Labor Act. Neal v. System Board of Adjustment, 348 F. 2d 722, 727 (8th Cir. 1965); Wade v. Southern Pacific Co., 243 F. Supp. 307, 312 (D. Tex. 1965); Railroad Workers Unemployment Council v. B. & O. R.R. Co., 52 CCH Lab. Cases 23,596, 23,598-99 (S.D.N.Y. 1965); see also Beebe v. Union R.R. Co., 208 A.2d 16 (1965). These decisions appear to share the view expressed by Mr. Justice Black in his dissent in Maddox, that Moore and Koppal had, as a practical matter, been overruled. See 379 U.S. 667. It does not appear that any Federal court has held to the contrary. But *cf.* In re Certain Carriers, 53 CCH Lab. L. Rep. 16,533 (D.D.C. 1966).

[4] As in the case of the Labor Management Relations Act, nothing in the language of the Railway Labor Act expressly provides for or precludes the application of state law or rules regarding exhaustion of remedies to suits on collective bargaining agreements. Resolution of such questions is, therefore, more a matter of dealing with the interstices of the statute than with its language.

contract under the Railway Labor Act, it is clear that Federal law governs the question of exhaustion. The Federal rule, as enunciated in *Maddox,* requires exhaustion, at least with respect to contractual remedies and, unless a tenuous distinction is to be drawn, with respect to National Railroad Adjustment Board remedies as well.[5]

In any event, the so-called "permissive" language of the Act dealing with referral of contract interpretation disputes to arbitration is permissive only in the sense that railroads, airlines, unions, or individual employees each have the right, but are not compelled, to submit every contract interpretation dispute to an Adjustment Board. As a practical matter, this means only that they may resolve or abandon any dispute short of that step if they desire to do so. But any unresolved dispute which an aggrieved party does not voluntarily abandon must be submitted to an Adjustment Board, since there is no other way in which it can be resolved. Strikes over such disputes are unlawful and neither a union nor an employee convinced of the merit of a grievance is likely to accede to an employer's position without exhausting the statutory right to arbitration. For all practical purposes, therefore, the Act provides for compulsory arbitration of contract interpretation disputes.

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[5] A holding merely that a railroad employee must exhaust his *contractual* remedies would be fatal to petitioner in this case since he conceded that he neither exhausted his contractual remedies nor attempted to proceed before the National Railroad Adjustment Board. On the facts in this case, therefore, the Court is not compelled to reach the question of exhaustion of administrative remedies if it holds that petitioner was, at the very least, required to pursue the contract grievance procedure to its conclusion.

II. No Valid Reason Exists for a Different Federal Rule in This Case Than That Applied in Maddox.

Since *Central Airlines* makes it clear that Federal substantive law governs the rights of the parties to this dispute, the ultimate question here is whether the Federal rule governing exhaustion of remedies announced in *Maddox* is applicable or whether persuasive reasons exist for adopting a diametrically opposite Federal rule for Railway Labor Act cases, under which exhaustion would not be required. No basis exists for any such incongruity.

A. Nothing in the Nature of Petitioner's Claim Justifies a Departure from Maddox.

Petitioner urges first of all that there are important differences between his complaint and that involved in *Maddox* which warrant application of a different rule.[6] Petitioner argues that, whereas *Maddox* involved a suit for severance pay to which the plaintiff claimed he was entitled under the collective bargaining agreement, the petitioner here alleged breach of a provision of agreement regarding retention of seniority rights and claimed, as the measure of damages, lost wages to which he otherwise would have been entitled. Thus, petitioner insists, *Maddox* was a suit to require defendant "to perform" the agreement while the instant case is a suit for damages for alleged *breach* of the agreement.[7] Pet. Br. 10.

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[6] As petitioner puts it, "there is no conflict between the doctrine announced in *Moore* and *Slocum* and the doctrine set forth in *Maddox*." Pet. Br. 10.

[7] In this same connection, petitioner insists on classifying his case as a "wrongful discharge" case. Pet. Br. 10, 17, 20. Yet it is by no means clear that this case can be so classified. The precise issue was whether petitioner's seniority was properly terminated

This is a meaningless distinction. The suit in *Maddox* was necessarily based on a claim that the company had violated the contract by refusing to make the severance payment. Indeed, petitioner's characterization of the suit in *Maddox* is inconsistent with the language of Section 301(a) of the Labor Management Relations Act, which was the basis for jurisdiction in that case. Section 301(a) gives district courts jurisdiction of suits "for violation of contracts between an employer and a labor organization. . . ." That a district court was deemed to have jurisdiction of the *Maddox* case indicates that, at least so far as the Labor Management Relations Act is concerned, there is no distinction between suits "to perform" collective bargaining agreements and suits for damages for their breach.

On still another ground the distinction petitioner attempts to draw is illusory. The only difference between *Maddox* and the instant case is that in *Maddox* the asserted measure of damages was to be found in the contract itself whereas here determination of damages would involve consideration not only of the terms of the collective bargaining agreement but extrinsic evidence as well. But the mere fact that the measure of damages happens to be set forth in a contract is scarcely determinative of the issue here.

Petitioner's claim that the rationale of *Maddox* "is not in conflict with . . . *Moore* and *Slocum*"—*i.e.*, that because of differences in the nature of the claim, this

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under the collective bargaining agreement. This turns solely on interpretation of the agreement, to determine the proper method of measuring the 30-day period provided for in Article 25(e)(3). Unlike the situation in ordinary wrongful discharge cases, petitioner was not actively employed by respondent at the time his seniority was terminated and was, therefore, not discharged in the usual sense of the word.

Court would be justified in applying a different rule with respect to exhaustion of remedies than it applied in *Maddox*—is patently without merit.

B. DEPARTURE FROM THE FEDERAL RULE OF EXHAUSTION IS NOT NECESSARY TO ASSURE IMPARTIAL DETERMINATION OF RIGHTS.

In urging that a railroad employee should not be required to exhaust his contractual and administrative remedies, petitioner necessarily asks that the rationale of *Maddox* as a logical outgrowth of *Lincoln Mills* and *Central Airlines* be disregarded and that the policy considerations supporting *Maddox* be ignored. The asserted justification for this is that an exception to the general Federal rule of exhaustion is necessary to assure railroad employees an impartial forum for their grievances. Petitioner apparently assumes that a union or union-designated members of the National Railroad Adjustment Board will act unfairly in ruling on an employee's grievance and therefore that the employee must be free to proceed immediately to court. Both the assumption and the conclusion are unfounded.

First, mere speculation as to possible unfairness is hardly a basis for not requiring at least an attempt to exhaust contractual and administrative remedies. As the Court of Appeals noted, if any unfairness on the part of the union in its representation of an employee is shown, the employee has a judicial remedy. See 354 F.2d at 952. Moreover, in this case there was no evidence that petitioner's union acted unfairly. All that appears is that the union believed that petitioner's position lacked merit. There is, of course, a vast difference between this and unfairness or bad faith on the part of the union.

Even assuming *arguendo* that a union official had acted in bad faith in refusing to process petitioner's

grievance, petitioner could have done so himself and could, under Section 3, First (i) of the Act, have appealed, if necessary, to the National Railroad Adjustment Board. There is no reason whatever to suppose that either the union or railroad members of the Board would not have acted in good faith in ruling on the grievance. Indeed, the normal presumption is that they would.

Petitioner, at pages 14-16 of his brief, makes the further argument that he would have had no right of appeal to the courts if he had pursued his remedies before the National Railroad Adjustment Board and the Board had ruled against him. Although prior to June 20, 1966, the Railway Labor Act did not provide for judicial review of decisions of the National Railroad Adjustment Board denying relief sought by a union or an employee,[8] this does not aid petitioner's argument.

Petitioner is not entitled to be exempted from the requirement of exhaustion of remedies merely because exhaustion might have resulted in final denial of his grievance. Nor is petitioner's suggestion that members of the Board would act in bad faith a basis for arguing that statutory judicial review is a necessary pre-requisite to a requirement for exhaustion of administrative remedies. Putting to one side the wholly speculative nature of petitioner's supposition, it is plain that if members of the Board acted in bad faith in ruling against an aggrieved employee, the employee would have an adequate judicial remedy regardless of

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[8] Section 2(e) of Public Law 89-456, enacted on June 20, 1966, 80 Stat. 210, provides for limited judicial review of decisions of the National Railroad Adjustment Board denying relief sought by a union or by an employee. See page 26, *infra*.

the absence of statutory provisions for judicial review. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 652 (1965); *Steele* v. *Louisville & N. R.R. Co.*, 323 U.S. 192 (1944).

Petitioner's fundamental position in this case seems to rest on the assumption that unions subject to the Railway Labor Act are less trustworthy than unions subject to the Labor Management Relations Act and are incapable of fairly representing their members. Not a shred of evidence supports this assumption. Moreover, even if petitioner's charges of unfairness were supported by evidence, they would hardly warrant the anomalous result urged by petitioner—namely, that state law should apply to questions of exhaustion of contractual and administrative remedies under the Railway Labor Act while Federal law applies to similar questions under the Labor Management Relations Act.[9]

C. THE SAME POLICY REASONS FAVOR EXHAUSTION HERE AS IN MADDOX.

The policy reasons advanced by this Court in *Maddox* when it declined to follow *Slocum, Moore* and *Koppal* and instead applied a Federal rule requiring exhaustion apply equally to this case. Indeed, the Court could have been speaking either of the Railway Labor Act or the Labor Management Relations Act when it said in *Maddox* —

> "Union interest in prosecuting employee grievances is clear. Such activity complements the

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[9] The absence of any logical connection between petitioner's argument and the ruling he urges upon the Court is further demonstrated by the fact that, even under the doctrine of Slocum, Moore and Koppal, failure to exhaust contractual and administrative remedies would bar a railroad employee's suit if that happened to be the applicable state law.

union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.

"A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'" 379 U.S. 650 at 653.

One theoretical reason for permitting common law actions for wrongful discharge without exhaustion of contractual or administrative remedies is that such an action does not involve questions of future relations between the railroad and its other employees, or that if it does, the decision will not constitute a binding precedent. *Cf. Slocum* v. *Delaware L.&W.R.R. Co.*, 339 U.S. 239, 244 (1950).

Yet this theory has no application here. In the instant case, the question of whether the termination

of petitioner's employment was wrongful turns entirely on interpretation of the 30-day provision contained in Article 25(e)(3) of the collective bargaining agreement. The question is how, in the context of the railroad industry, time is to be computed under such a provision. Specifically, should the first day of such a period be included and the last excluded, or should the first day be excluded and the last included? R.23. Or might there be still another proper interpretation of this provision as applied to the facts here? There cannot be the slightest doubt that the resolution of such questions would have a significant effect on future relations between the railroad and its other employees.[10] It is likewise idle to suppose that a court decision on such a question would not be regarded as a compelling precedent.

Apart from this, there is even greater justification here for application of the Federal rule requiring exhaustion. In this case, the understanding and custom of the industry were of paramount importance to a proper construction of the somewhat unusual language employed in the collective bargaining agreement (R.29), and in the correspondence between respondent's superintendent and petitioner. R.5. Obviously the National Railroad Adjustment Board would have been uniquely well qualified to pass upon the questions involved. Even the District Court below recognized that the railroad jargon was unusual and that the Board could have served an important purpose in this regard. See also the opinion of the court below (354 F.2d at 952) and *Slocum v. Delaware L.&W. R.R. Co.*,

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[10] Indeed, the resolution of such questions could lead to a demand by either the railroad or the union for a modification of the language of the collective bargaining agreement.

supra.[11] In such a case there is just as much, if not more, reason for requiring exhaustion of remedies than there was in *Maddox* on the issue of severance pay.

D. THE NATURE OF ADJUSTMENT BOARD PROCEDURES AND REMEDIES DOES NOT WARRANT A DEPARTURE FROM THE MADDOX RULE.

In footnote 14 of the decision in *Maddox*, the Court said:

> "By refusing to extend *Moore* v. *Illinois Central R. Co.* to § 301 suits, we do not mean to overrule it within the field of the Railway Labor Act. Consideration of such action should properly await a case presented under the Railway Labor Act in which the various distinctive features of the administrative remedies provided by that Act can be appraised in context, *e.g.*, the make-up of the Adjustment Board, the scope of review from monetary awards, and the ability of the Board to give the same remedies as could be obtained by court suit." 379 U.S. at 657.

The administrative procedures and remedies provided by the Railway Labor Act do not differ significantly from those under any collective bargaining agreement establishing arbitration as the means of resolving disputes about interpretation of the agreement.

The Adjustment Board is divided into divisions according to type of craft. Each division is composed

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[11] In Slocum the Court said:

> "The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. [Footnote omitted.] Long and varied experiences have added to the Board's initial qualifications." 339 U.S. at 243.

equally of representatives of management and organized labor. The procedures for the settlement of disputes which reach the Adjustment Board are not specified in minute detail but are set forth generally in Section 3, First (i), (j), (k), (l), (m), (n) and (o) of the Act. They provide, *inter alia,* that either an employee, a group of employees or a carrier may refer a dispute to the Adjustment Board.

Parties may be heard in person, by counsel, or by other representatives. Due notice of hearings is required. Any division of the Adjustment Board can delegate authority to two or more of its members to conduct hearings and make findings, but final awards must be by the entire division. Awards must be in writing and must be furnished to the respective parties. The Board has authority to interpret its own awards.

The Board may decide cases by majority vote of the division involved. Most importantly, if a division of the Board fails to agree on an award because of inability to secure a majority vote, a neutral person must be designated to sit with the division as a member and make an award. The make-up of the Adjustment Board is thus, in the final analysis, equivalent to any arbitration tribunal in which the power of decision is given to an impartial third party.

In keeping with the high degree of flexibility of arbitration procedures generally, see Updegraff & McCoy, *Arbitration of Labor Disputes,* 182 (2d ed. 1961); Beatty, *Labor Management Arbitration Manual,* 51, 53, 57 (1960); Sturgis, *Commercial Arbitration and Awards,* 422-519 (1930); Trotta, *Labor Arbitration,* 96-109 (1961), the Adjustment Board has established by regulation only general procedures to be followed. *Cf.* 29 C.F.R. 301.1-301.9. Indeed, the Adjustment

Board appears to vary its procedures with the requirements of the case before it. The flexibility of the Board's procedure is illustrated in *Gunther* v. *San Diego & A.E. Ry. Co.*, 382 U.S. 257 (1965), in which the Court upheld appointment by the Board of three physicians to decide for it a question of fact about an employee's physical condition.

Beyond this, the Board avoids technical legal language and procedures, is flexible in its choice of remedy and is not bound by common law rules of evidence. See CCH Lab. L. Rep. ¶ 5675 at 11,255-59 (1966); Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency,* 46 Yale L.J. 567 (1937). In so proceeding, the Adjustment Board carries out the Congressional mandate expressed in Section 3 of the Railway Labor Act. As the Court said in *Gunther,* Congress

> "invested the Adjustment Board with the broad power to arbitrate grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, acting on the Adjustment Board with their long experience and accepted expertise in this field." 382 U.S. 257 at 261-62.

Finally, the Adjustment Board can give at least the same remedies as can be obtained by a court suit. Indeed, no express limitation is imposed by the Act on the type of remedy that may be ordered by an Adjustment Board, and money awards are expressly provided for in Section 3, First (o) of the Act. 48 Stat. 1189, 1192 (1934); 45 U.S.C. § 153 (1965). If anything, an Adjustment Board may grant an even broader remedy than a court. The Adjustment Board has exclusive

primary jurisdiction in any breach of contract case in which an employee seeks reinstatement. *Cf. Slocum* v. *Delaware L.&W. R.R. Co.* and *Moore* v. *Illinois Central R.R. Co., supra.*

With respect to the scope of judicial review, this Court has already ruled, in *Gunther,* that Adjustment Board decisions have "the same finality that a decision of arbitrators would have." 382 U.S. at 263. Indeed, prior court decisions had so indicated. Compare *Textile Workers* v. *Lincoln Mills, supra* and *Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564 (1960), with *Brotherhood of R.R. Trainmen* v. *Chicago River & Ind. R.R. Co.,* 353 U.S. 30 (1957); *Union Pacific R.R. Co.* v. *Price,* 360 U.S. 601 (1959); *Brotherhood of Locomotive Engineers* v. *Louisville & N. R.R. Co.,* 373 U.S. 33 (1963).

Prior to the enactment of Public Law 89-456 on June 20, 1966, the Railway Labor Act limited the finality of money awards and made decisions of the Adjustment Board prima facie evidence of the facts in judicial review proceedings. Sections 2(a), (c), (d) and (e) of Public Law 89-456 eliminated the limitation of finality in cases involving money awards and substituted for the "prima facie evidence" language words making the findings and order of the Adjustment Board "conclusive on the parties" and further limited the scope of judicial review by providing that Adjustment Board orders may not be set aside except for

> "failure of the division to comply with the requirements of this Act, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order."

Legislative action subsequent to *Gunther* has thus reinforced the Court's decisions which limited to approximately the same degree the scope of judicial review of decisions of labor arbitrators generally and decisions of the Adjustment Board.

In summary, nothing in the administrative remedies provided under the Railway Labor Act warrants application of *Moore* and *Koppal* rather than *Maddox* to cases arising under the Railway Labor Act. If anything, the similarity of the administrative remedies provided for by the Railway Labor Act to customary arbitration procedures indicates that the principle of *Maddox* is equally applicable to Railway Labor Act cases.

III. The Decision Below Does Not Deprive Petitioner of Any Constitutional Right.

Petitioner also appears to assert two constitutional arguments in support of his position. Specifically, he suggests that the effect of the decision below is to deny him equal protection of the laws and to deprive him of a right to trial by jury.

Neither argument was raised in the court below nor suggested in the petition for certiorari. Accordingly, neither is properly before this Court. Supreme Court Rule 40-1(d) (2); *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 428 (1964); *Carpenters & Joiners* v. *NLRB,* 357 U.S. 93, 96 n.1 (1958).

Even assuming that these arguments had been timely, however, both are clearly without merit. The equal protection argument rests on a completely erroneous factual premise—that the right of an employee to obtain judicial review of an order of the National Rail-

road Adjustment Board is relatively narrow, whereas an employer may appeal an adverse Adjustment Board decision to the courts and secure a trial *de novo*.

While the Railway Labor Act was for a time open to such a construction, this Court made clear in the *Gunther* case that no such disparity exists between employer and employee as respects their right to judicial review. Moreover, as indicated above, Congress recently amended the Railway Labor Act to eliminate even the *appearance* of such a disparity. Thus, P.L. 89-456 inserted a new paragraph "(q)" in Section 3, First, of the Railway Labor Act, providing in part as follows:

> "If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggreived by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees, or carrier may file in any United States District Court in which a petition under paragraph (p) could be filed, a petition for review. . . ."

In short, the rights of employee and employer to judicial review under the Railway Labor Act are today precisely the same and no basis whatever exists for an equal protection attack on the decision of the court below.

Petitioner's reliance on the Seventh Amendment is equally misplaced. The Seventh Amendment guarantees that the right to trial by jury shall be preserved in suits at common law and also restricts the power of Federal trial and appellate courts to overturn jury factual determinations. But the Seventh Amendment

does not preclude either state legislatures or the Congress from doing away with common law actions altogether and substituting therefor administrative proceedings which otherwise satisfy the requirements of due process. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), *Rowlette* v. *Rothstein Dental Lab., Inc.*, 63 F.2d 150 (D.C. Cir. 1933), *cert. denied*, 289 U.S. 736 (1933). See also *New York Central R.R. Co.* v. *White*, 243 U.S. 188, 200, 202 (1917), *Mountain Timber Co.* v. *Washington*, 243 U.S. 219, 234, 235-40 (1917), and *Voehl* v. *Indemnity Ins. Co.*, 288 U.S. 162, 166 (1933), which this court cited in its order denying certiorari in the *Rowlette* case.[12]

It follows *a fortiori* that to require petitioner to exhaust his contractual and administrative remedies before seeking judicial vindication of his claim does not deny him any Seventh Amendment right.

IV. No Basis Exists for a "Prospective" Decision in This Case.

By emphasizing in his brief that this Court did not hand down the *Maddox* decision until "eight days" after the District Court's entry of judgment (Pet. Br. 4, 10),[13] petitioner appears to argue that even if the Court of Appeals correctly applied the rationale of *Maddox* here, that court nevertheless erred in reversing

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[12] The denial of certiorari in Rowlette, a case raising a strikingly similar Seventh Amendment issue as that raised here, is of particular significance in view of the extraordinary action of the Court in citing authority in its order, thereby disclosing the basis for its ruling.

[13] Maddox in fact followed the District Court entry of Judgment by seven days; the respective dates were January 25 and January 18, 1965, as petitioner correctly notes.

the District Court because "the District Court had a right to enter Judgment for . . . [petitioner] on January 18, 1965." Pet. Br. 4.

This argument is wholly fallacious. Assuming for a moment that *Maddox* is the case that "overruled" the doctrine of *Moore* and *Slocum,* it does not follow that, because the District Court entered judgment prior to the *Maddox* decision, the Court of Appeals should have declined to follow *Maddox.* The well-established rule is that an intervening change in the law due to the overruling of a prior decision must be applied and given effect even when to do so requires reversal of a lower court decision indisputably correct when rendered. *Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U.S. 538 (1941).

Of course it is equally logical to view *Central Airlines* as the case which "overruled" *Moore, Slocum,* etc. Under such an analysis it is unnecessary even to invoke the *Vandenbark* doctrine in support of the Court of Appeals' decision, for *Central Airlines* was handed down by this Court in April 1963, four months before the instant suit was even filed.

And if one puts aside entirely these somewhat metaphysical concepts and assumes that the instant case, not *Maddox* or *Central Airlines,* will deliver the *coup de grace* to *Moore, Slocum,* etc., still the decision of the Court of Appeals was obviously correct. Petitioner can hardly question the power of a court to disregard prior decisions, which have plainly lost their vitality, and make its action effective in the case in which such action is taken.

On rare occasions this Court has—in the limited field of criminal law and where the public policy

reasons for so doing were deemed overwhelming—refused to apply the precedent or *stare decisis* effect of a case retroactively. See, *e.g., Linkletter* v. *Walker,* 381 U.S. 618 (1965); *Johnson* v. *New Jersey,* 384 U.S. 719 (1966).

But in no case has the Court declined to apply the rule of a case to the specific controversy giving rise to *that* case. For this reason, as well as because no significant countervailing public policy considerations are present, there could be no possible justification for the Court's overruling *Slocum, Moore* and *Koppal* in the field of the Railway Labor Act while declining to apply its rule to the controversy now before it. Indeed, petitioner's delay of approximately six years in instituting a court proceeding scarcely provides a basis for any claim of inequity or justifies being rewarded by extraordinary action on the part of this Court.

Accordingly, it is clear that the brief time lag between the District Court's entry of judgment on the instant case and this Court's decision in *Maddox* in no way casts doubt on the propriety of the Court of Appeals' decision, which faithfully reflects the trend of decisions in this Court, beginning with *Lincoln Mills,* continuing with *Central Airlines,* and given effect most recently in *Maddox.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed. If, however, the Court were to reach the opposite conclusion, it is plain that the disposition of the damage issue urged in petitioner's brief (Pet. Br. 18-20) would be improper. Respondent's position on the issue of damages was not even

considered by the Court of Appeals since it did not reach that issue. The issue could not have been, and was not, raised in the petition for certiorari. It is therefore not before this Court. Supreme Court Rule 40-1(d) (2) and cases cited on page 25, *supra*.

Respectfully submitted,

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October 1966

APPENDIX

(Defendant's Exhibit No. 4—Letter dated August 23, 1957, from L. G. Tolleson to R. L. McCollum)

August 23, 1957 fd
LF-6-W-57

Mr. R. L. McCollum, General Chairman,
Brotherhood of Locomotive Firemen and Enginemen,
First National Bank Building,
Tuscumbia, Ala.

Dear Sir:

On March 3, 1957, R. E. Walker, who was working as yard fireman on 3:00 p.m. to 11:00 p.m. assignment at Air Line Junction, Charlotte, N. C., was notified that he had been displaced by another fireman through exercise of seniority. Mr. Walker did not then place himself on another assignment, mark up for any other service or request permission to be off, but simply elected to absent himself without proper leave.

When the matter was brought to the attention of Division Superintendent Brosnan, he wrote Walker at his Forest City, N.C. address on April 29, 1957, advising him that he stood for work and that unless he protected his seniority standing within thirty days from April 29, he would forfeit his seniority. Receipt of the letter was acknowledged on April 30 on the prescribed post office form, the letter having been sent by certified mail.

On May 29, at 2:45 p.m., Walker reported to the yard office at Charlotte, but was not permitted to mark up, inasmuch as he had not complied with the Superintendent's notice to report within thirty days from April 29.

On May 30, Mr. Brosnan again wrote Walker, referred to the previous letter dated April 29, and advised him that his name had been stricken from the seniority list and that he was no longer considered an employee of the Southern Railway Company. At 4:30 p.m. that same date, Walker discussed his case with Superintendent Brosnan personally

at Greenville, at which time Walker admitted he had failed to protect his seniority within the prescribed time limit. During this discussion with the Superintendent, Walker also indicated he had been off sick and in the hospital for an operation during March and that his daughter had reported this to the Company by long distance telephone call; however, the Superintendent's staff advises they have no record or knowledge of such a call having been received. Mr. Brosnan declined to change his decision in the matter.

On June 24, 1957, the Superintendent received a statement dated June 18, 1957 signed by Dr. T. R. Harris of the Gardner-Webb Community Health Center, Boiling Springs, N. C., copy of which is attached, concerning Walker's physical condition. Your attention is called to the fact that Dr. Harris gives a history which I believe you will agree anyone will interpret as meaning that Walker was unable to work during the period he was off.

In the light of the circumstances related above, will you please advise promptly what your position is with respect to this matter, i.e., whether Walker has forfeited his seniority because of his failure to report for work in conformity with notice served on him by the Superintendent, or whether his name should be restored to the seniority roster in view of the evidence he has produced from his doctor that he was under doctor's care during the period in question.

Very truly yours,

(S) L. G. Tolleson
L. G. Tolleson
Director of Labor Relations

(Defendant's Exhibit No. 5—Letter dated September 16, 1957, from R. L. McCollum to L. G. Tolleson)

GENERAL GRIEVANCE COMMITTEE
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN
SOUTHERN RAILWAY SYSTEM

First National Bank Building
Tuscumbia, Alabama

R. L. MCCOLLUM
GENERAL CHAIRMAN

September 16, 1957

Mr. L. G. Tolleson
Director of Labor Relations
Southern Railway System
Washington 13, D. C.

Dear Mr. Tolleson:

Referring further to your letter of August 23, 1957, concerning the seniority of Fireman R. E. Walker, Charlotte Division North. Your File LF-6-W-57.

This matter was discussed with you while in Washington September 11. You requested that I write you concerning my position in this matter. As I explained to you in conference, it does not matter with the Organization whether this man is returned to service or not. However, the record indicates that Fireman Walker was displaced on March 3. After being away from the service approximately 47 days, Superintendent Brosnan notified Mr. Walker that he would be required to return in 30 days or his name would be removed from the seniority list. Mr. Walker did not return within the 30 days and his name was subsequently removed from the list.

It seems Fireman Walker absented himself from service without proper leave and has forfeited his seniority. However, he did produce a doctor's statement that he was under the doctor's care during this time. Regardless of this, it did not prevent him from notifying Superintendent Brosnan at least during the 30 day period he was given to return to service. Article 26(g)(3) of the firemen's agreement provides, "Firemen, hostlers and outside hostler helpers who voluntarily leave the service will rank as new

men if reemployed". It also seems that any claim Fireman Walker might have is barred from further handling by Article 32(b) of the firemen's agreement. He did not handle his case as therein required with Superintendent Brosnan, nor did he process same to the next ranking officer.

Considering the circumstances in this case and the Claimant's previous record, it would appear that the best action to take would be to let the matter rest as it is with Fireman Walker's name removed from the list.

Very truly yours,

(S) R. L. McCollum

R. L. McCollum

RLM:wc

(Article 32 of Collective Bargaining Agreement between Southern Railway Company and Brotherhood of Locomotive Firemen and Enginemen)

ARTICLE 32

REPRESENTATION AND ADJUSTMENT MATTERS

(a) REPRESENTATION

The right of any engineer, firemen, hostler or outside hostler helper to have the regularly constituted committee of his organization represent him in the handling of his grievances, under the recognized interpretation placed upon the schedule involved by the officials of the Company and the general committee making the same, is conceded.

(b) GRIEVANCES

(1) No grievance will be entertained unless presented in writing to the Superintendent within sixty day after its occurrence by the fireman, hostler, outside hostler helper or the committee of his choice. Firemen, hostlers, and outside hostler helpers shall have the right to appeal to the next ranking officer, provided such appeal be made in writing within sixty days after the Superintendent has rendered his decision to the fireman, hostler, outside hostler helper or the local committee representing him.

(2) The word "grievance" as used in paragraph next above refers to and covers all matters arising under schedule rules including, but not limited to, matters such as discipline and time claims. To be entertained must be presented in writing to Superintendent within sixty days after its occurrence, and, in event adjustment be requested which involves a money payment, the period covered by such adjustment cannot antedate a date sixty days prior to the date upon which such claim is filed.

(3) Claims involving time payments in other than discipline cases shall be deemed to have been filed when a time ticket is filed with the Superintendent or other proper officer to whom such time tickets are sent by employees involved. If declined by Superintendent, must be further handled or appealed in writing within sixty days. If not handled or so appealed within such sixty days, further handling is barred.

(4) Appeals, to be recognized under the statute of limitation rule, must be made in writing within sixty days from the date of final decision by any officer to whom an appeal has been made to the next ranking officer to whom appeal is to be made until such appeal reaches the highest ranking officer authorized to pass on such appeals. If not so appealed, further handling is barred.

(5) When erroneous over-payments are made, no retroactive adjustments will be made for a period of more than sixty days prior to the date such erroneous payments are discovered and employees notified that such adjustments are to be made.

NOTE: Section (b) effective August 1, 1944.

(c) COMMITTEES

Properly constituted committees of firemen or hostlers desiring to present any matter to any proper official, will be granted leave of absence as soon as possible after application has been made.

(d) DISMISSAL FOR COMMITTEE WORK

No fireman or hostler will be dismissed from the service of the Company for serving on an adjustment Committee.

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No. 89

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ROY WALKER, *Petitioner*

v.

SOUTHERN RAILWAY COMPANY, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

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ROY WALKER, *Petitioner*

v.

SOUTHERN RAILWAY COMPANY, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

Respondent petitions for rehearing of the Court's decision issued on December 5, 1966, on the ground that the decision was based on facts that were not presented to the Court by either party and that, contrary to the understanding of the Court, are totally inapplicable to this case. The facts relate to the length of time required to resolve discharge cases before the National Railroad Adjustment Board.

In deciding that petitioner did not have an adequate administrative remedy comparable to that in the *Mad-*

dox case,* the Court relied on statements contained in the legislative reports connected with the enactment of Public Law 89-456, 80 Stat. 208-210, effective June 20, 1966. The statements were to the effect that railroad employees sometimes have to wait as long as ten years or more for a decision by the Adjustment Board, and that the First Division of the Board has a current backlog of approximately seven and one-half years.

These facts are wholly inapplicable to the petitioner in this case, as appears from the following statement in the House Committee Report, which the Court appears to have overlooked:

> "Cases involving dismissal or suspension of employees are . . . expedited, but frequently require as much as 2 years for a decision to be reached from the date the grievance initially arose." H.R. Rep. No. 1114, 89th Cong., 1st Sess. 10 (1965).†

Petitioner was not faced with a delay of seven and one-half or ten years as the Court apparently assumed. His claim, which arose in 1957, would certainly have been processed by the Adjustment Board under the expedited procedure, and thus would have been resolved in two years or less.

In fact, petitioner waited until March, 1960, almost three years after his claim arose, to institute a state

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* Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).

† Although it thus appears that it takes the Adjustment Board as much as two years to resolve some dismissal or suspension cases, it is plain that others take less time. In any case, court dockets being what they are, it seems most unlikely that a discharged employee would obtain as prompt a resolution of his claim through court litigation even if he instituted a suit the day after his discharge.

court suit against respondent.* If petitioner had proceeded promptly before the Adjustment Board, his claim would, as indicated in the House Committee Report, have been resolved at least one year before March, 1960, perhaps even earlier.

It follows that the general statements in the legislative reports quoted by the Court with respect to the length of time involved in Adjustment Board decisions have no bearing on this case.

Against the background of the facts actually applicable to this case, the rule established by the Court is anomalous. Expeditious resolution of an employee's grievance is normally far more important in a case involving a claim for reinstatement than in a case where only a monetary award is sought—particularly when the employee himself waits almost three years before commencing a suit in court. Yet the law is perfectly clear that in a reinstatement case an employee must first exhaust Adjustment Board remedies before suing in court, without reference to the time involved in pursuing the Adjustment Board remedies. *Slocum* v. *Delaware, L. & W. R.R. Co.*, 339 U.S. 239 (1950). This is so regardless of the non-reviewability of an unfavorable Adjustment Board decision. *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 614-16 (1959). In no reinstatement case have the courts thought that expedition would be achieved by encouraging state or Federal court suits rather than resort to the Adjustment Board.

Paradoxically, in this case the Court unintentionally encourages delay, in the mistaken belief that court

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* Petitioner voluntarily nonsuited the state court proceeding and instituted the instant case in a Federal district court approximately *six years* after his claim arose.

litigation provides a quicker resolution of the type of claim asserted by petitioner than an Adjustment Board proceeding.

CONCLUSION

We respectfully submit that, as in *Flora* v. *United States*, 357 U.S. 63 (1958), *rehearing granted*, 360 U.S. 922 (1959), the Court's decision hinged on an erroneous understanding of the facts. The net result is that unjustified inconsistencies and anomalies in the law have been created. In these circumstances, and for the reasons set forth in the dissenting opinion of Mr. Justice Harlan, Mr. Justice Stewart and Mr. Justice White, the Court should reconsider the case.

Respectfully submitted,

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December 23, 1966

Certificate of Counsel

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

JEROME ACKERMAN
JOHN S. KOCH

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SUPREME COURT OF THE UNITED STATES

No. 89.—October Term, 1966.

Roy Walker, Petitioner, v. Southern Railway Company.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[December 5, 1966.]

Per Curiam.

Under *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630, decided in 1941, a discharged railroad employee aggrieved by the discharge may either (1) pursue his remedy under the administrative procedures established by an applicable collective bargaining agreement subject to the Railway Labor Act, and his right of review before the National Railroad Adjustment Board, or (2) if he accepts his discharge as final, may bring an action at law in an appropriate state court for money damages if the state courts recognize such a claim. See also *Slocum* v. *D., L. & W. R. Co.*, 339 U. S. 239, 244; *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U. S. 653. The question in this case is whether those decisions should be overruled in light of *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, decided in 1964.

Petitioner was a yard fireman in the employ of respondent railroad. He sued in a North Carolina court on a claim that respondent had unlawfully discharged him on May 29, 1957, in violation of its collective bargaining agreement with the Brotherhood of Locomotive Firemen and Enginemen. The action was removed by respondent to the Federal District Court by reason of diversity of citizenship. The District Court overruled respondent's challenge to its jurisdiction, citing *Moore*, *Slocum*, and *Koppal*, and entered a judgment for damages in petitioner's favor. 237 F. Supp. 278. The

Court of Appeals for the Fourth Circuit reversed, holding that *Maddox*, decided after the entry of the District Court judgment, required that petitioner first exhaust his administrative remedies. 354 F. 2d 950. Since our opinion in *Maddox* expressly stated that "we do not mean to overrule [*Moore* v. *Illinois Central Railroad Company*] within the field of the Railway Labor Act" but that "consideration of such action should properly await a case presented" under that Act, 379 U. S., at 657, n. 14, we granted certiorari, 384 U. S. 926. We reverse.

Maddox presented the question whether contract grievance procedures provided in a collective bargaining agreement subject to the Labor Management Relations Act and culminating in binding arbitration might be sidestepped in favor of a lawsuit, in light of the federal policy reflected in the LMRA of favoring such agreed-upon contract grievance procedures as the preferred method for settling disputes. The action was brought in an Alabama state court by an employee of the Republic Steel Corporation for severance pay allegedly owed him under the terms of a collective bargaining agreement which contained such a grievance procedure. We held that contract grievance procedures voluntarily incorporated by the parties in collective bargaining agreements subject to the LMRA, unless specified by the parties to be nonexclusive, must be exhausted before direct legal redress may be sought by the employee.

Provision for arbitration of a discharge grievance, a minor dispute, is not a matter of voluntary agreement under the Railway Labor Act; the Act compels the parties to arbitrate minor disputes before the National Railroad Adjustment Board established under the Act. *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U. S. 30. Both at the time of petitioner's alleged discharge and at the time he brought his lawsuit, there was considerable dissatisfaction with

the operations of the National Railroad Adjustment Board and with some of the statutory features. Congress initiated an inquiry and found that among other causes for dissatisfaction, "railroad employees who have grievances sometimes have to wait as long as 10 years or more before a decision is rendered [by the Board] on their claim"; for example, "the First Division [which has jurisdiction over disputes involving yard service employees of petitioner's class] . . . has never been current in its work, [and has] a backlog of approximately 7½ years . . . ." H. R. Rep. No. 1114, 89th Cong., 1st Sess., at 3–5; S. Rep. No. 1201, p. 2. The Congress also found that "if an employee receives an award in his favor from the Board, the railroad affected may obtain judicial review of that award by declining to comply with it. If, however, an employee fails to receive an award in his favor, there is no means by which judicial review may be obtained." H. R. Rep., at p. 15. S. Rep., at 3.

In consequence, Congress enacted Public Law 89–456, 80 Stat. 208–210, effective June 20, 1966, which drastically revises the procedures in order to remedy the defects. Of course the new procedures were not available to petitioner, and his case is governed by *Moore*, *Slocum*, and *Koppal*. The contrast between the administrative remedy before us in *Maddox* and that available to petitioner persuade us that we should not overrule those decisions in his case.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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SUPREME COURT OF THE UNITED STATES

No. 89.—October Term, 1966.

Roy Walker, Petitioner, v. Southern Railway Company. } On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[December 5, 1966.]

Mr. Justice Harlan, whom Mr. Justice Stewart and Mr. Justice White join, dissenting.

I dissent because I believe this Court's decision in *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, requires the explicit overruling of *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, a case that has already been all but completely vitiated by subsequent decisions.

In *Moore*, a railroad trainman brought an action for damages based upon an alleged wrongful discharge without first exhausting administrative remedies. Federal jurisdiction was invoked on the ground of diversity; at that time an employment contract under the Railway Labor Act was thought to be governed, like ordinary contracts, by state law. The applicable law in that case—that of Mississippi—did not require exhaustion of remedies. The Court held that nothing in the Railway Labor Act required a contrary result.

The premise of the *Moore* decision, that state law was applicable to this type of labor contract, was removed in a series of decisions holding that labor contracts governed by the Labor-Management Relations Act and the Railway Labor Act are subject to federal substantive law, not state law. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448; *International Assn. of Machinists* v. *Central Airlines, Inc.*, 372 U. S. 682. In *Maddox*, *supra*, the doctrine of exhaustion of remedies was declared by this

Court to be a part of this federal labor law: "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." 379 U. S., at 652. Strong policy arguments were adduced in *Maddox* to support this general rule. See 379 U. S., at 652–653; Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 647–652 (1956).

I can see no reason why this rule should be thought inapplicable to cases under the Railway Labor Act. Although the *Maddox* decision did not explicitly cover such cases, the single dissenting Justice recognized that the Court, ". . . while declining expressly to overrule . . . [*Moore* and its progeny] in this case, has raised the overruling axe so high that its falling is just about as certain as the changing of the seasons." 379 U. S., at 667. The only two courts of appeals to deal with the impact of *Maddox* on *Moore* have concurred in declaring that exhaustion of remedies is now required in the railway labor field. *Walker* v. *Southern R. Co.*, 354 F. 2d 950 (C. A. 4th Cir.); *Neal* v. *System Bd. of Adjustment*, 348 F. 2d 722 (C. A. 8th Cir.). A Pennsylvania appellate court has refused to permit a suit like this one in state court on that ground that since *Maddox*, "We cannot see how the Moore case is still effective to permit a recovery in a state court suit in this case." *Beebe* v. *Union Railroad Co.*, 208 A. 2d 16, 20. Other state courts have reached the same conclusion. *Buchanan* v. *St. Louis Southwestern R. Co.*, — Tex. Civ. App. —, 400 S. W. 2d 362; *Caffery* v. *New York Central R. Co.*, 24 App. Div. 2d 1075, 265 N. Y. Supp. 2d 742.

The rule of exhaustion of contractual and administrative remedies is a salutary one in an area in which specialization is important and the expertise of certain arbitral

bodies is recognized. In *Whitehouse* v. *Illinois Central R. Co.*, 349 U. S. 366, 371, the Court noted that " 'The railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making.' Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency, 46 Yale L. J. 567, 568–569." It is true of course, as the Court observes, that in the Labor-Management Relations Act cases arbitration is imposed contractually while under Railway Labor Act arbitration by the Adjustment Board is mandatory for all "minor" contractual disputes. If anything, this distinction weighs in favor of respecting Congress' determination that disputes as to proper practices under a railroad labor contract be settled—at least initially—through direct negotiation between the affected parties and, that failing, by Adjustment Board arbitration.

The Court's only rationale for refusing to take the step of formally overruling *Moore* at this time, a step to which current precedent, logic, and policy all so persuasively point, is that there has apparently been some dissatisfaction with the speed of the Board's procedures and with the statute's scope of appeal. This dissatisfaction is properly the subject of congressional concern. It is in my view, however, unsound for this Court to make the question whether exhaustion of remedies applies depend upon our decision as to how effectively we think the Board is functioning. It should be enough, as a unanimous Court said just last Term, that Congress ". . . . invested the Adjustment Board with the broad power to arbitrate grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, serving on the Adjustment Board with their long experience and accepted expertise

in this field." *Gunther* v. *San Diego & A. E. R. Co.*, 382 U. S. 257, 261–262. The Court there stated: "This Court time and again has emphasized and re-emphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board." *Id.*, at 263.

We need not even go back to last Term for such an expression of confidence in the workings of the Railroad Adjustment Board as the central organ of Railway Labor Act contract interpretation. In today's decision in *Transportation-Communication Employees Union* v. *Union Pacific R. Co.*, *ante*, p. —, the Court holds that the jurisdiction of the Board extends to settlement of triparte work-assignment disputes. "The railroad, the employees, and the public, for all of whose benefits the Railway Labor Act was written," the Court says, "are entitled to have a fair, expeditious hearing to settle disputes of this nature." *Ante*, p. 6. To meet arguments that the Board is not capable of dealing with such complex problems, the Court rightly notes that the Board can ". . . with its experience and commonsense, handle this entire dispute in a satisfactory manner in a single proceeding." *Ante*, p. 8.

I can see no reason why the Board, for purposes of the simple run-of-the-mill contract dispute raised in the present case, is suddenly deemed so incapable of adequately handling the question that the familiar labor law doctrine of exhaustion of remedies is ignored in this instance.

I would affirm the judgment of the Court of Appeals.

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